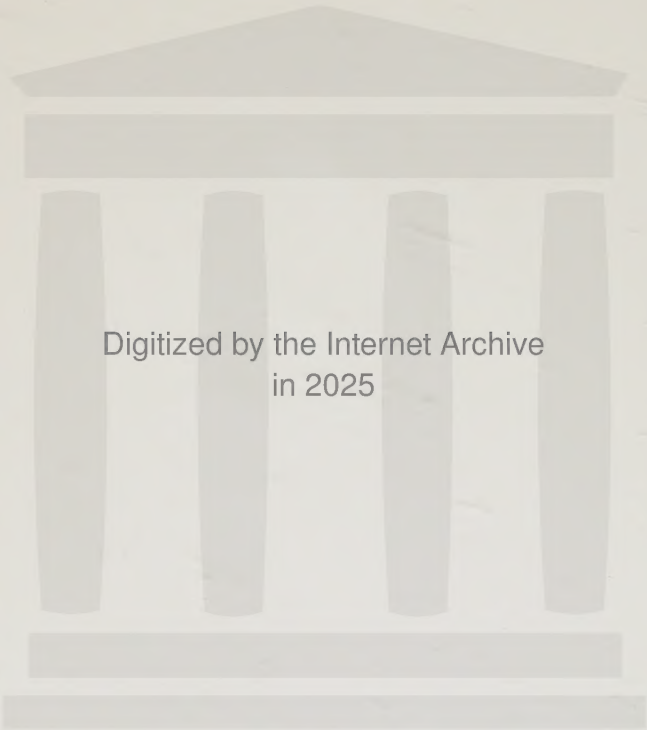
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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law

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CHICAGO

Modern American Law

PLEADINGS IN CIVIL ACTIONS AT COMMON LAW AND UNDER MODERN STATUTES

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VOLUME 13

BLACKSTONE SCHOOL OF LAW, INC.

CHICAGO

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PREFACE.

This volume of Modern American Law is largely devoted to what is known as adjective law—the law of remedies. The law is divided into two principal divisions: Substantive Law, defining rights and duties; and Adjective Law, defining the remedies by which rights are protected and duties are enforced.

The first treatise, "Pleadings in Civil Actions", discusses the rules of common law, statutory, and code pleading. The various forms of actions and methods of pleading are explained, including the necessary allegations in defending actions and the simplified forms adopted by most courts.

The first treatise leads naturally to the second one, "Practice in Civil Actions", in which the ordinary problems encountered in actual court practice are enumerated and discussed.

Such differences as exist in courts of equity are explained in the following article, "Equity Pleading and Practice". The first three articles, therefore, comprise what is generally known as "Pleading and Practice".

The customary civil remedies are described in the above treatises, but there are other remedies, known as "Extraordinary Remedies", which are given spe-

cial attention in a separate article under that title, which includes complete discussions of the writs of mandamus, quo warranto, certiorari, and habeas corpus, with a special article, because of its importance, dealing with the subject of habeas corpus alone.

The concluding treatise in this volume deals with the subject of "Interpretation of Statutes", which discusses the general rules and principles by which statutes are interpreted and constructed by the courts.

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PART I

PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

BY

LOUIS B. EWBANK, LL.B.*

CHAPTER I.

NECESSITY OF PLEADING AND IMPORTANCE OF SUBJECT.

1. **Pleadings defined and described.**—The pleadings in an action at law consist of statements, in a logical and legal form, of the facts which constitute the plaintiff's cause of action and the defendant's ground of defense. They comprise (1) a first statement by the plaintiff, which (2) is denied by the defendant as to its truthfulness, or as to its legal sufficiency to give any right of action, or in answer to which the defendant alleges new matter intended to meet and overcome the plaintiff's statement of his action. In case the defendant sets up new matter, (3) the plaintiff is then called upon to overcome it, either by denying its truthfulness or its sufficiency as a defense, or to allege new matter which over-

* Former Justice, Supreme Court of Indiana. Author: "Manual Indiana Appellate Practice," "Indiana Trial Evidence," "Indiana Criminal Law," "Modern Business Corporations."

comes the allegations of the defendant's answer, and thus supports the plaintiff's original pleading.

Under the practice in some states this is as far as the pleadings may extend, except that the defendant may question the legal sufficiency of the plaintiff's second pleading; the law itself, in those states, presuming a denial of the truthfulness of the allegations in plaintiff's second pleading, or replication. At the common law the plaintiff and the defendant continued to file pleadings, in alternate succession, until one of the parties questioned the truthfulness or the legal sufficiency of the other party's last pleading, or expressly denied some fact averred by his adversary. If the defendant has a cause of action against the plaintiff he may sometimes bring a cross-action in the same proceeding by way of set-off or counterclaim.

2. **Necessity for use of pleadings in presenting case in court.**—In the decision of all controversies between human beings, it is necessary that the nature and the extent of the controversy shall be stated and determined before any intelligent investigation and the determination of the case can be made. This holds true even with students in a debating society; for unless the subject be definitely and accurately stated, the students may merely wrangle over unimportant and immaterial matters, and after the contest and decision nothing satisfactory to any of the participants will have been attained. Far more important than the matter of definitely and accurately stating the subject of a debate is the matter of having definite and accurate pleadings in

the settlement of controversies of sufficient importance to require their decision by tribunals organized and supported by the state; for the pleadings in an action in a court determine the evidence which may be introduced at the trial and the scope of the judgment to be rendered by the court.

3. **Importance of knowledge of the subject of pleading.**—But the difficulty of securing accurate and definite pleadings in the trial of actions in courts has always been one of the great problems in the administration of justice. The courts and the law-making power have sought in many ways to correct the evils incident to poor pleading, but they have never succeeded in formulating rules whereby a lawyer, ignorant of the rules and statutes governing this important branch of the law, can properly prepare a cause for trial and decision by a court.[1]

4. **Disregard of rules of pleading works hardship.**—All rules laid down for the conduct of human affairs will work occasional hardship, and the rules of pleading are no exception in this respect. The reader must therefore keep in mind that the hardship which may sometimes appear in the application of any rule of pleading is but an incident of the endeavor by the courts and legislators to escape the possible evil consequences which would result from the lack of that rule. The reader should also remember that laxity of rules is productive of even more injustice than severity of rules. He should keep in mind that indolence and ignorance will fail to comply with any established order of affairs, and

[1] McFaul v. Ramsey, 20 How. 523 (U. S.), LEADING ILLUSTRATIVE CASES.

that most of the failures of justice incident to the enforcement of the rules of pleading are traceable directly to indolence and ignorance.

5. **Rules should be strictly complied with.**—The courts and the lawmaking powers have been attempting for hundreds of years to formulate rules of pleading which will result in presenting a definite issue for trial without working a hardship upon the party failing properly to prepare his pleading. Though the established rules have been changed and modified, indolence and ignorance have always crowded the line of non-compliance, and the less that has been required the less effort has been made to meet the requirements, so that it appears from examining the decisions on pleading that the states allowing the greatest laxity in pleading have as many or more cases where injustice is traceable to violations of the law of pleading than those states which require a degree of accuracy. Rules cannot be made so loose but that the ignorant and indolent person will violate them. An attorney should learn to comply with the rules of pleading in the courts where he practices, instead of rebelling against them.

6. **Factors which go to make up an action in court.**—In all court proceedings in civil actions there must be at least three separate factors. The first factor is a court. The court must have at least one judge, while it may consist of several judges, a jury, a clerk, a bailiff, and other officers to assist in the decision of controversies and in recording the decisions. The second requisite for a proceeding in court is a person or persons seeking the enforcement

of an alleged right or the redress of an alleged wrong. When this second requisite consists of one person he is called the plaintiff, and when two or more bring or prosecute an action they are called plaintiffs. The third requisite for a proceeding in court may consist either of a person or persons from whom, or of property out of which, the plaintiff seeks redress for an alleged injustice or legal wrong. When this third requisite is one person he is known as the defendant and when it is more than one they are known as defendants; while in a case where the proceeding is against property, it is called the res, or thing, to which liability attaches.

7. **Systems of pleading used in different courts.**—Every government which has achieved any stability has established courts. These courts have sought to protect and restore the rights and to redress the wrongs of persons within their jurisdictions. All these countries and their courts have to some extent developed systems of pleading whereby it has been sought to have the matters in dispute so stated that the statements might be either proved and established or disproved and overthrown by evidence. In some countries more than one form of pleading has been used. In England, for instance, there were three forms of civil pleadings. One of these forms of pleadings was used in the common law courts, another was used in the equity courts, while a third was used in the ecclesiastical (church) courts.

8. **Common law rules as modified by statute.**—The pleadings filed and used in the English courts at this time and in the various courts of this country

in civil cases are all descended from those of the two English courts first named in the preceding section, the English common law courts and the English courts of equity. The ancient rules of pleading used in those English courts control the pleadings in our courts in all matters not specially changed or modified by statute. But, although they have some controlling force in our courts, they are not fully in force in any modern courts either in this country or in England. But such rules, and especially the common law rules of pleading, while no longer in full force, are of great importance to the lawyer of today by reason of being the basis upon which all of our systems of pleadings are founded.[2] For while the statutes modify the common law to some extent, the common law modifies and colors the statutes made in modifying it. It is therefore necessary to have a general understanding of all the rules governing common law pleading, and a particular knowledge of all those rules which have not been changed or modified by special statutory enactment.

9. **Original writs.**—The ancient common law pleading, when first practiced, was entirely oral, and was written down by the clerk upon the issue roll as the facts relied upon were declared by the attorneys for the several parties. This practice of oral pleading has long since been superseded by written pleadings filed on behalf of the parties, but it has been declared in several states that oral pleadings are still allowable where not forbidden by statute.[3]

[2] McFaul v. Ramsey, 20 How. 523 (U. S.), LEADING ILLUSTRATIVE CASES.
[3] 31 Cyclopedia of Pleading and Practice, p. 45.

The common law depended to a great extent upon the form of the pleading as governing its sufficiency. This was partly due to the fact that under the earliest procedure a person seeking to enforce a right or obtain redress for a wrong could not proceed in a court (the administration of justice being one of the powers of the king), without first obtaining a writing in the name of the king, called an original writ, authorizing the suit. After the plaintiff had obtained this original writ it became his authority for the suit, and he could not depart from its form and continue to claim any authority for the prosecution of the suit.

10. **Consequences of suing out the wrong writ.**—The lawyers of those times were much like the lawyers of today. Some were shrewd and diligent, and some were indolent and dull of comprehension. As a result many meritorious actions were lost because the plaintiff's attorney chose a writ which did not authorize a recovery for the particular wrong of which the plaintiff complained. And since the writ was a license only to recover for one kind of wrong, the plaintiff was denied all relief when he failed to show himself entitled to recover on that account, whatever he might have been able to recover under a different writ, if his attorney had obtained the proper one.

11. **Definition of action at law as distinguished from suit in equity.**—A proceeding in a common law court in England was known as an action, while proceedings in the equity courts, "courts of chancery," as they were called, were known as suits.

Lord Coke (one of the noted English judges of the time of Queen Elizabeth), defined an action at law as being "nothing less than the lawful demand of one's right," and again as "nothing less than the right of pursuing in a court of justice that which is due one." In this country, in states and courts where the distinctions in form between the common law and equity pleadings are still maintained under practice acts, the lawyers still speak of actions in referring to common law cases, while they speak of proceedings on the equity side of the court as suits. In states that have adopted the code system of pleading (which combines some of the equity rules and statutory provisions with the common law rules of pleading), the lawyers use the words "action" and "suit" interchangeably, though they understand the difference in their accurate use. In this work only the word "action" will be used.

12. **Classification of actions.**—Actions are divided, in respect to the subject matter of the controversy, into three classes: first, real actions, involving the title or possession of real estate; second, personal actions, involving the title or possession of personal property, or the recovery of a money judgment against the defendant; and third, mixed actions, involving the title or possession of real estate, and also the recovery of a judgment for damages. Actions are also divided into two classes with relation to the nature of the wrong complained of, being: first, actions growing out of contracts; and second, actions for torts or wrongs, the word "tort" meaning wrong. A plaintiff may sometimes waive

the tort, and sue upon contract where he has a right of action in tort, but he may never sue in tort for a mere non-performance of a contract. These different forms of actions will be considered later.

13. **Importance of a study of the statutes in relation to pleading.**—For the practice of law in any particular state the reader should study the statutes of such state and the decisions construing those statutes, in connection with any general work on the law of pleading. Even a lawyer who has practiced law for many years in one state will not attempt to draft a pleading for use in another state without some examination of the statutory requirements on the subject in the jurisdiction where the pleading is to be used.

14. **Subject of pleading not unreasonably difficult.**—The reader should approach the subject of pleading in a cheerful and hopeful state of mind, for the law of pleading can easily be comprehended by any person possessed of a logical mind capable of developing any great legal capacity. The reader who will enter upon the study of this subject with confidence in himself and confidence in the intelligence of the learned judges and legislators who formulated and established the rules of pleading, will reach a fair comprehension of the subject from careful reading. But experience in preparing pleadings, and the study of the pleadings actually used in a case in court will be of advantage as an aid in understanding the terms used in the text.

CHAPTER II.

HISTORY OF COURTS AND PLEADING.

15. **Description of ancient English courts.**—During the early history of England the inhabitants were largely dependent upon inferior courts, which were partly under the control of persons having authority in each neighborhood. The lowest and smallest of these courts was known as the court of piepoudre, curia pedis pulverizati (court of dusty feet; i. e. wayside court), and was little more than a neighborhood gathering; the next was the court baron, and the next the hundred-court; while above this was the shire or county court. These courts were largely under the control of the principal man of that division of the community where they were established, who was often interested in the litigation which was before the court. William the First (or William the Conqueror, as he is sometimes called) established courts of the king for the purpose of dispensing justice and collecting a certain amount of revenue from the litigating parties. These courts were the Court of the King's Bench, the Court of Common Pleas, and the Court of the Exchequer.[4] Each of these three courts had at first a certain jurisdiction which was different from the jurisdiction of each of the other courts; but each in its endeavor to expand its jurisdiction took over any case in which there was an

[4] 4 Blackstone, Commentaries (Cooley 2nd ed.), * pp. 30-60.

element of its jurisdiction, and by the use of fictions relative to conditions took cases that really contained no element of such jurisdiction until the three courts came to have concurrent jurisdiction in a large measure, especially over the cases which originally belonged to the court of common pleas. There was in the government of England an officer known as the chancellor, and he issued the writs or permits to sue to the persons who desired to bring an action in any of the king's courts.

The chancellor himself held a court where he gave relief to those who could not obtain it by using the simple forms of the common law, and this court was known as the court of chancery. These early courts of the king originally followed the king in his various trips when he traveled about over England, as he was the one supposed to give relief to the wronged subject. King John abused his privileges in thus moving the court, and the Magna Charta provided that the court should be held at a definite place, and it was established at Westminster, since which time the places of holding courts have been certain, though one judge may hold the court in several different places on a circuit. The courts held on the circuits in England were called nisi prius courts, and sat for the purpose of filing pleadings, examining witnesses, and conducting trials by jury.

16. **Chancellor's power to issue writs and to grant equitable relief.**—The chancellor was supposed to keep the king's conscience and to exercise the king's authority in granting relief to a wronged suitor, where there was no adequate provision in the com-

mon law for giving relief. The chancellor rendered decisions on his own judgment without having to call a jury, and gave a personal decree ordering the person guilty of a wrong to do or not to do certain acts. The original writ was at first issued by the chancellor, and later issued out of the court of chancery, as the chancellor sitting in the court of chancery was held more directly to represent the king. When a subject felt himself wronged in such a manner that the common law courts could not furnish adequate relief he would petition the chancellor in his court, as the direct representative of the king, and pray him to grant the relief which justice demanded. The chancellor and his court, acting directly for the king, required no authority from the king to award relief, so that no original writ was required. The court of chancery would not entertain a suit where it appeared that there was an adequate remedy at common law, for a subject could not expect extraordinary relief when there was any writ under the common law by which proper relief could be obtained. The petitioner's (plaintiff's) pleading (petition) was addressed to the chancellor, and followed a long form, setting out in detail the injustice suffered by the petitioner, and showing that he was himself without fault and could not have an adequate remedy at common law. In the code states of this country the form of the first pleading in an action resembles an equity petition as nearly as it does a common law declaration, and is a substitute for both. In the other states the equity pleadings are still required to be longer than the common law pleadings. In all states

a person seeking equitable relief must show himself entitled to it under the old maxims of equity practice. But a discussion of equity procedure is beyond the scope of this article, and is properly a part of the article on Equity Pleading. The above is given only for the purpose of enabling the reader better to understand the present court practice. The former practice in the ecclesiastical (church) courts, which had jurisdiction of probate and divorce matters, does not materially affect our practice of today.

17. **Courts established in United States.**—In the United States, most of the states have given jurisdiction over the subjects which were within the jurisdiction of all of these courts, both the common law courts and courts of equity, to local courts, which in different states are called by some distinctive name, as circuit courts or district courts; and in those states where a code has been adopted, the pleadings in all kinds of actions are much the same as to form, though the facts constituting the right of action differ in different cases. In other states practice acts have been adopted, to some extent modifying the common law and equity rules, so that the pleadings in different classes of actions have been modified to resemble each other more nearly. Statutory additions to the rules of pleading and practice have also been made which are intended to aid in the administration of justice. In some states probate, county, and other courts have been established to relieve the circuit courts of some of their burdens.

18. **Kinds of actions maintainable at common law.**—In the early history of England a person who

believed he had a right of action against another was compelled to pay for the right of bringing an action, the same as a person is now required to take out a license before he may lawfully do certain acts, such as running an automobile or driving a bus. As authority for bringing the action he was given a written parchment, which was called an original writ. This writ was his authority from the king to prosecute the action in the king's court. In those early days the people were simple in their habits and rough in manners, and not over-sensitive in their feelings, while there was but little property except land, crops, buildings, farm animals, and other property connected with the land. As the times were unsettled, commercial transactions were few and of simple and primitive kinds, and the few actions brought were to recover specific tracts of land, specific articles of personal property or domestic animals, or damages for injury to persons or property, or actions upon the small contracts incident to the simple life. Among such primitive people with little property, it required but a few simple actions to dispose of their controversies. By reason of these facts, the most ancient writs provided only for the most obvious kinds of wrongs; but, in the progress of society, cases of injury arose that were new in their circumstances, and were not reached by any of the writs known in practice. But after the law clerks had issued these few original writs for a number of years, they were reluctant to issue any writ other than the old ones in common use. To remedy this lack of writs, Parliament, in the reign of Edward I,

passed an act requiring the law clerks to formulate new writs where no old writ would warrant the court in giving a remedy for the wrong. This statute gave rise to the writ and action of trespass on the case. Since that time this action has been developed, and is now much used in cases where the facts which constitute a cause of action do not come within the scope of any of the old writs.

19. **Importance of choice of proper writ.**—The original writ being the sole authority for bringing or maintaining the action at common law, an original writ for redress in one kind of action could never be authority for maintaining an action of another kind, or for obtaining the relief incident to a different kind of action. When the plaintiff began his action upon the wrong kind of writ, the evidence would not sustain it, and the only possible result was a failure of the action. Some of the distinctions developed by the courts as existing between the different kinds of writs were the result of false reasoning, and the distinctions became distorted by the hair-splitting reasoning sometimes used by the courts. By reason of these facts it was sometimes difficult for the plaintiff's attorney to determine what was the proper writ for a contemplated action. This resulted in many failures of justice, because of the wrong writ being chosen and actions failing for that reason. Original writs have long since been abolished and are not now used, either in this country or England. Though the use of the original writ was abolished many years ago, the plaintiff was, for many years, compelled to word his pleading after the forms of the

old original writs, as the language of the writs had acquired a legal meaning far broader than its grammatical meaning. Where the plaintiff did not follow the proper and established form, his pleading was held insufficient. It is still a rule of good pleading that where words have an exact established legal meaning they should be used, and the pleader should not attempt to substitute words of his own in their stead. But this rule will be considered in a subsequent section.

20. **Statutes remedying abuses of the rules of pleading.**—Some of the old common law courts carried the rule of insisting upon forms to such an extent that it became distasteful to the people, and numerous corrective statutes have been passed in England and in the several states of this country to overcome the severity of the rule. The first of these remedial statutes was passed in the time of Edward III of England, and forbade attacking the mere form of a pleading, after a trial and a verdict by the court or jury, by the use of what is called a motion in arrest of judgment. There have been numerous corrective statutes since that time which have attempted to overcome the abuses in pleading as they were developed in practice before the courts.

CHAPTER III.

COURSE OF AN ACTION.

21. **Obtaining knowledge of facts and preparing declaration.**—An attorney who contemplates bringing an action must first obtain all of the available facts tending to influence the right of action, as a slight difference in the facts may entirely change the nature of the relief to which his client is entitled. He should then fully investigate the law governing actions of the class to which he believes that action belongs, to determine if there are any difficulties in the way of maintaining the form of action contemplated, and obtaining the benefit of that particular remedy. After he has the facts fully marshalled and the law applicable to them well in hand, he is then ready to draft his first pleading, which, under the common law, is called the declaration. In some states it is called the complaint, and in other states it is called the plaintiff's statement, while in equity practice it is known as the petition.

22. **Process to bring defendants into court.**—The attorney must determine who shall be named as plaintiffs and who as defendants (which subject will be considered later), and must also see that all the defendants are properly brought into court by the service of lawful notice or by voluntary appearance. In some of the states the plaintiff must file his first pleading (declaration or complaint) before any no-

tice may be issued for the defendant, while in other states the plaintiff may file a notice of the nature of his action, and request the court to issue process commanding the defendant to appear, which process is usually called a summons. The method of beginning an action is regulated by statute in all the states.

Upon the filing by the plaintiff of his declaration or notice and his request for process, the court will summon the defendant to appear and answer plaintiff's claim. Unless the action is by way of attachment or replevin, or other effort to reach or to affect certain property within the court's jurisdiction, or is to obtain a divorce, or otherwise to affect the status of the plaintiff, the defendant must be personally served with summons, to give the court jurisdiction over his person, before the court may render a judgment affecting the rights of the defendant in the action. This service of summons is made by the sheriff or other proper court officer upon each of the defendants. If any of the defendants are not within the jurisdiction of the court, and the action is to affect their property in the possession of the court, or is otherwise an action in which the court may enter a valid judgment without rendering any personal judgment against these defendants, the statutes of the different states provide for the publication of notice. This usually involves the posting of the notice in certain conspicuous places or publishing it in a newspaper. The statutes also provide how the plaintiff may proceed against only a part of the defendants, where some of them are without the jurisdiction of the court, which is either by dis-

missal as to those not within the jurisdiction, or by publication where their property within the jurisdiction of the court is sought to be affected. This publication of notice will not support a judgment affecting any property of the defendant not proceeded against in that action. In case the defendant has been guilty of fraud or other great wrong named by the statute, or is shown to be about to leave the state to evade the jurisdiction of the court, the plaintiff may have the defendant arrested and brought personally before the court by a summons called a capias ad respondendum (take [the defendant] to respond).

Ordinarily the plaintiff may not proceed by seizing the defendant's property or having him arrested without first showing good cause by affidavit, and complying with such other safeguards of property and liberty as the statutes of the state provide. But the necessity for an affidavit showing cause, in order to procure the arrest of the defendant in a civil action, is created wholly by the statutes in force in the different jurisdictions.

23. **Form and substance required in pleadings.**— Under the common law and in states where the form of the pleading is material, an attorney should be careful to follow the established forms as nearly as possible. Never substitute other language for that which has an exact legal meaning. If the pleading is under the code adopted by a state, or under a practice act of a state which abolishes the use of forms, the attorney for the plaintiff, in drawing his first pleading, should be very careful to state by

positive averment every material fact essential to a cause of action of the kind to which his action belongs. He should also be careful to state facts under which all of the evidence by which he intends to support his action may be sustained. If the attorney, in preparing an answer or a replication, is seeking to overcome a former pleading by a denial of its allegations, he should be careful that the denial is sufficiently exact and broad enough to overcome the allegations of the pleading he is seeking to meet. If he is seeking to overcome a former pleading by alleging new matter, he should be sure that it fully meets the allegations in that former pleading (unless it is filed as a partial answer). Good pleading under any form requires that the allegations of the plaintiff's first pleading shall show a cause of action, and that any after-pleading of new matter shall entirely overcome the former pleading, unless pleaded only as a partial answer to that pleading.

24. **All the essentials of a pleading must be stated.**—The failure to state one essential element of the plaintiff's right of action will make his pleading insufficient; and as completely insufficient as a failure of the cook to use one of the essential elements of a baking will prevent the product from being the intended article of food, or as the failure to weld one link of a chain will make the chain a weak and inoperative appliance. The essential statements should be made in a positive and exact manner, complying with the rules of pleading hereafter given, and with any provisions of the statutes of the state where the action is brought.

25. **Pleadings which defendant may use.**—After the plaintiff has filed his pleading and the defendant has been summoned to appear, the defendant must set up his defense to the action. This defense may be either: (1) a dilatory plea, showing that the particular action cannot be maintained in the manner in which it is brought; (2) a demurrer to the plaintiff's pleading because it shows upon its face that plaintiff cannot maintain the action in the manner in which it is brought; or (3) a plea (or answer) setting up a defense to the action, and stating why the plaintiff cannot recover, which is called pleading to the merits of the action.

26. **Dilatory pleas by the defendant.**—Dilatory pleas are of three classes: (1) pleas to the jurisdiction of the court; (2) pleas in suspension of the action; and (3) pleas in abatement of the action. A defendant wishing to use more than one of these dilatory pleas should be careful to use them in the order in which they are named, for a pleader may no more use a defense which he has passed, after making use of the next in order, than a passenger on a train can alight at a station which he has passed, after remaining upon the train to reach a station farther on. The pleader may not call upon the court to determine the sufficiency of allegations in a plea in abatement, and afterward question the fact that he is before the court, nor in any other manner recognize the existence of a fact and then deny it. If the jurisdiction is to be denied by a plea in abatement it must be the defendant's first plea. Dilatory pleas, being an evasion of the charge of wrong and

injustice contained in the plaintiff's pleading, are not favored by the courts, nor are they upheld unless they present the facts alleged in such a manner that the court cannot escape upholding them. The form and matter of dilatory pleas will be discussed later.

27. **Demurrer to the declaration may be presented.**—If the defendant sees no opportunity to prevent the prosecution of the action, as by denying the jurisdiction or pleading in abatement, his next consideration is the sufficiency of the plaintiff's pleading. The law does not compel a defendant to be at the trouble and expense of a trial to determine the facts of an action until a sufficient pleading has been filed against him by the plaintiff. If the plaintiff has an erroneous conception of the law, but is fair in his presentation of the facts, the defendant may obtain a ruling by the court upon the facts stated in the declaration by filing a demurrer to it. Under the early practice a decision upon a demurrer was decisive of the merits of the action. The present practice is to allow amendments of the defective pleading by the party filing it, or to allow the party who files a demurrer which is overruled then to answer the pleading on its merits. This presents a condition which requires a consideration of all the possible after-results, in determining whether or not the defendant shall file a demurrer, or answer the defective pleading and go to trial upon it. Gaining a ruling with respect to a pleading which merely serves to educate the opposing party may only prepare him for a stronger fight at the trial, and lessen the chance of a final judgment in favor of the party

demurring. A demurrer reaches only those legal defects in a pleading which are apparent upon its face. It does not reach the defect of uncertainty, if the broad, general allegations of fact state grounds for an action, though not with sufficient certainty and particularity properly to apprise the defendant of the exact facts on which the action is based; a motion to make more specific, and not a demurrer, being the remedy for such a defect. The demurrer, as before stated, only questions the legal sufficiency of the matters stated, to support the action. A demurrer does not question the truthfulness of any statements of alleged facts, the ruling being made on the theory that they are all true, and a judgment overruling a demurrer is a decision that the matters alleged, if true in fact, are sufficient in law. This subject will be considered at length in later sections.

28. **Motion to make pleading more specific.**—If the defendant has filed one or more of the dilatory pleas and the demurrer, or any or all of them, but the court decides against him, or if he has waived the right to file any or all of them, he may still, in many states, question the sufficiency of the pleading, declaration, or complaint, by a motion. This motion may ask the court to require that the facts be stated in a more definite manner, to inform the defendant better of the exact nature of the charge which he is required to meet, or to require that the plaintiff shall otherwise make his pleading more accurate so as to conform to the rules of good pleading.

In jurisdictions where the question of form is still important, a defect of form is generally reached by a

special demurrer. Whether the matter is one which is reached by a demurrer or by a motion, the question, shall the defendant use or shall he not use this means of correction, when it is available, raises another question—will such a demurrer or motion be the means of gaining greater information for himself and restricting the plaintiff on the trial, or will it merely aid the plaintiff and help to enlighten him on a matter of which he is ignorant, by calling attention to the essential points in his case, and will it thus enable him to present a stronger cause for the defendant to overcome. If facts exist which are not sufficiently alleged and are fully known to the defendant, unless they are favorable to him, nothing can ordinarily be gained by calling attention to their omission by a demurrer or motion. The use of motions or other means whereby the adverse party's pleadings are corrected is largely a matter of discretion, resting in the sound judgment of the attorney having the right to use them. But a good attorney will never force his client to strengthen the opposing side of the cause for any glory incident to a mere ruling in his favor which is not helpful to the ultimate winning of a final judgment in favor of his client. Each opportunity for the correction of the other party's pleadings presents many conflicting factors which must be weighed in the light of existing circumstances, and a decision reached by the attorney having the right to demand a correction. It is a case for the exercise of discretion which may be influenced by rules, but must finally rest on practical common sense.

29. **Plea of defendant, stating his cause of defense.**—If the defendant waives his right to file a dilatory plea or a demurrer, or if he does file either or both of them and they are overruled (and he does not wish to let judgment be rendered against him on the ruling for purposes of an appeal, and no additional remedy by motion is desired), the defendant is then required to plead to the merits of the plaintiff's alleged action. This pleading at common law was called the plea, and in the equity practice and under most of the codes it is called the answer, while in jurisdictions where the pleadings are required to be sworn to, it is sometimes called an affidavit of defense or affidavit of merits. This statement of his defense by the defendant may consist either of a denial of the facts alleged, as constituting the plaintiff's cause of action, or allegations of such new matter as the defendant believes will overcome the facts alleged in the plaintiff's pleading.

During the period covered by the early English cases the defendant was permitted to rely upon but one defense. He might either deny that the facts giving a right of action ever existed, or confess that the right of action once existed and then set up such new matter as he believed overcame it; but he could not both deny the cause of action and also confess and avoid it. Afterward the defendant was given the right, by statute, in some jurisdictions, to file a plea containing several paragraphs, each of which stated a separate defense. He could in one paragraph deny that the cause of action ever existed, and at the same time, in other paragraphs, confess

that a liability once existed, but state facts showing that all liability had ceased to exist; but he could not mix his confessions and denials. Each paragraph was required to be plainly a denial or a confession and avoidance, and when the defendant attempted to avoid by the allegation of new matter, he must at least give color to the allegations of the plaintiff's pleading. This is now the law in many jurisdictions. In many of the states there are express statutes providing that the defendant, in the same paragraph, may deny part of the allegations of the plaintiff's pleading and allege new matter to overcome other allegations. A few jurisdictions permit only a single statement of the defense, which must be sworn to. Where the defendant files more than one paragraph undertaking to state his cause of defense, each paragraph must state a sufficient defense standing alone. It cannot in any way depend for support upon another paragraph.[5]

30. **Replication and formation of issue.**—After the defendant has filed his first plea to the merits of the action, the plaintiff may either demur to it, or file a motion to strike it out, or to make it more specific, or may otherwise correct it under the same rules that the defendant can question the sufficiency of the plaintiff's first pleading. If the plaintiff either waives or exhausts these privileges without disposing of the defendant's pleading, he must then meet, by a replication, any new matter alleged in any paragraph thereof. This replication is governed by the same rules which govern the defendant in

[5] Considered in Chap. VIII.

preparing his defense to the merits of the plaintiff's first pleading. The plaintiff in his reply may either deny or avoid, or he may deny and avoid, under the same rules governing the defendant in pleading. In many states of this country, the reply is the last pleading allowed, and the law presumes a denial by the defendant of all the new matter contained in the reply. At common law the defendant might file a pleading called a rejoinder, and the plaintiff a sur-rejoinder, the defendant a rebutter, the plaintiff a sur-rebutter, and such alternate pleadings thereafter as were required to reach either a denial of the facts alleged in the last pleading, or a challenge of its legal sufficiency. The number of pleadings allowed is governed by the statutes of the state where the action is brought. The original common law rule contemplated all of the former pleadings as merely the course by which the parties reached an issue upon the final pleading; but under the modern practice the issue is ordinarily broader than merely one particular fact, as contemplated by the early common law, and two or more issues are often joined in the same action and tried together.

31. **Issues — Their effect and importance.**—The parties having answered the pleadings of each other until they have reached an issue, by which it has been determined what the one party alleges and the other denies, either as to its truth or its sufficiency in law to support the action or defense, the cause is ready for trial. If the issue is an issue of law on demurrer, it is submitted to the court immediately, by force of the demurrer, and the court rules upon

the demurrer at such time as he chooses, either immediately or at a later date, to suit his convenience. The party defeated by the ruling is given the right to amend, but also has the right to stand upon the ruling on the demurrer, and to let judgment go against him in that court, and, by appeal or writ of error to a higher court, to question the first court's decision.

If the issue is joined upon a denial of one or more facts pleaded by either or both of the parties, the pleadings and the issues become very important, for they control the evidence which may be admitted to support or overcome the allegations of such pleadings or issues of fact. After judgment is rendered in the action, whether it be on demurrer or on the trial of issues of fact (whether the trial of facts is before the judge or a jury), the pleadings become important as determining what was decided in the action, since the law will presume that all things were litigated and decided which could be determined under the issues formed in the case.

32. **Motions in arrest of judgment.**—After the trial of an action on an issue of fact, the defeated party has the right to file a motion for a new trial for certain causes, which are ordinarily the causes specified by a statute of the state. Even though no error in the trial or decision of the action amounts to cause for granting a new trial, the defeated party may move in arrest of judgment. This motion can only be sustained where the pleadings will not support a judgment against the party moving in arrest of judgment. Such a motion is not

vored, and where the defendant has gone to trial nd there is a finding against him, the motion will e overruled and judgment will be rendered against m on the finding, unless the complaint is very de- ctive. In many states the rule is that if the com- aint is sufficient to bar another action for the same use the motion must be overruled. But the fact at it is sometimes sustained in all states shows the ecessity for good pleadings, and also shows that me attorneys are negligent in presenting poor leadings.

33. **Principal examples of pleadings to be used as ds.**—In the preceding sections the history, the use, nd the necessity of pleadings have been discussed, nd the course of an action from its commencement ntil the judgment by the trial court has been taken p in a general way. These matters have been thus resented that the reader may by this means more eadily get the right point of view in studying the ules governing the science of good pleading. In ne following sections it will be the aim to give the nore essential rules governing both common law nd code pleading. The subject of common law leading will be first discussed, and the more promi- ent characteristics of the various actions recognized y the common law shown. The reader will find reat profit in the study of the subject of pleading y going to the court house of his county, and ask- ng the clerk of the court for permission to read ome of the pleadings filed, especially in cases where e is acquainted with the circumstances and the acts. Observe the different degrees of care and ac-

curacy of expression employed by the careful attorneys in the different cases. If some of the cases examined are suits in equity, while others are simple common law actions, the reader should observe the greater length of the pleadings in the equity cases, not only in states using a modified form of common law pleading, but also in the states governed by codes. The reports of decisions of the courts having appellate jurisdiction in all of the states set out pleadings which have been challenged by demurrers, with the suggestions of counsel as to what each pleading lacks of being sufficient, and the decision of the courts as to which of the objections are well founded, stating the reasons. The student may spend a few hours profitably reading some of the cases appealed from his own county by lawyers with whom he is acquainted, in which questions of pleading were involved.

CHAPTER IV.

COMMON LAW CAUSES OF ACTION.

34. **Real actions.**—At common law there were ve real actions;[6] but some of these ceased to exist any years ago and others were of such nature that ey could be of no interest in our country, as one epends upon an established church and others were r different reasons unsuited to our laws and sages. Only one of these five real actions is recog- zed in the United States, and that in a modern form. his is the action by writ of entry, and it exists in few states where the old action, greatly modified, recognized only as a mixed action in which dam- ges may be recovered with the recovery of the nd. The action of writ of entry involves both the tle and the possession of the land and cannot be aintained upon an equitable title. There must also ave been a disseisin of the plaintiff or the person nder whom he claims. The action is little used now, ut is the remnant of one of the most frequently sed of the early common law actions.

35. **Personal actions — Classification.**—Personal ctions are those brought for the recovery of specific ersonal property, or the recovery of a debt, or for amages for the breach of a contract, or for the in- ury to a person or property. At common law there

[6] 3 Blackstone, Commentaries (Cooley's 2nd ed.), Ch. X, * pp. 167-197.

were nine forms of personal actions (counting the action of trespass on the case, which was especially recognized by an early statute).[7] Each of these actions required its own particular state of facts to support it, and each of them furnished its own peculiar relief. These personal actions were divided into two classes, one class being actions on contract, and the other on torts. The first class, actions on contracts, embraced four separate forms of actions, as follows: (1) assumpsit; (2) covenant; (3) debt; (4) account. In some of these actions, as will be shown, an express contract was not absolutely necessary, but might be presumed from the circumstances of the case.

The second class, actions for torts, embraced five separate actions, as follows: (1) trespass; (2) trover; (3) trespass on the case (commonly called case); (4) detinue; (5) replevin. These several actions will be considered in the order named, first considering the personal actions on contract in their proper and logical order.

36. **Personal actions on contract.**—As has been seen, the personal actions on contract were assumpsit, covenant, debt, and account. Some of the most prominent characteristics of each of these actions will now be considered. The action of assumpsit in most states lies for damages for the breach of any contract not under seal. The contract may be written or oral; at common law any contract without a seal being known as a parol contract. At common law,

[7] 3 Blackstone, Commentaries (Cooley's 2nd ed.) Chs. VIII, IX, * pp. 115-165.

When a party affixes his seal to a contract the solemnity of the act transforms the contract into a specialty, and the promise into a covenant. When the action is on an instrument under seal the form of the action must be either covenant or debt. In some states the distinction between instruments under seal and without seal is still maintained, while in some of the states a seal does not change the character of the contract. Assumpsit is the proper action on an unsealed contract, whether the contract is oral or written, express or implied. It lies on any contract, whether for the payment of money, the delivery of goods, or the performance or forbearance of an act. This form of action is the only immediate remedy where the defendant has failed to pay one installment due on a contract which has not all matured, unless each installment is provided for by a distinct promise, as in the case of rent; that is, unless the undertaking to pay each installment is really a promise to pay a distinct sum on a day certain. The action will never lie unless there is an actual contract, or a contract can be implied by law. But where the law will imply a contract, either as a matter of law or by reason of the facts in the case, the action of assumpsit is a proper remedy.

37. **Assumpsit.**—The action of assumpsit is itself divided into two classes, special assumpsit and general assumpsit. Each of these two classes has qualities which make it peculiarly suited for use in actions of its class. Special assumpsit lies where the action is brought on a definite contract. It is based upon an express promise and will lie where an ex-

press promise can be shown. General assumpsit, or the other hand, lies where the plaintiff declares generally, as for a pecuniary demand founded on an executed consideration. The basis of the action of general assumpsit is the promise implied by law from the legal duty resting upon the defendant by reason of the acceptance of the consideration. Such a promise is implied by the law: (1) where the law presumes its existence as a fact by reason of the defendant's past behavior, either because of acts done by the defendant or permitted to be done by him, and which warrant an inference that an agreement actually existed; (2) where the law raises a promise as a legal presumption by reason of a legal obligation resting on the defendant. The law will not permit a person who has taken the property of another without any right to deny that he intended to pay for it, and therefore impliedly promised to pay for it. Whenever a plaintiff sues in assumpsit, where property was wrongly taken, it is called waiving the tort and suing in assumpsit. In any case where the defendant has accepted or taken the benefit of plaintiff's property or services under such circumstances that he ought to have promised to pay for the property or benefit, the law will imply that he did promise to pay. General assumpsit also lies where an action is for the recovery of a sum given by statute, by reason of the acts of the defendant. The defendant cannot deny that he promised to pay that which the law requires him to pay.[8]

[8] Metcalf v. Robinson, 2 McLean 363 (U. S.), LEADING ILLUSTRATIVE CASES.

38. **Assumpsit—Special contract partly performed.**—As a general rule a person cannot sue upon special promise in general assumpsit. But each the following conditions are exceptions to this neral rule, the exceptions being for the promotion justice: (1) Where the contract has been fully ecuted by the plaintiff and the payment by the fendant is all that remains to be done, general sumpsit will lie. (2) If the special contract is unforcible by reason of lack of form or other lack of ue execution (so that it cannot be enforced as a ritten special contract, but is not illegal), and the fendant has accepted benefits under this unenrcible contract, the plaintiff may recover in genal assumpsit for the benefit accepted by the dendant. This also holds true in some cases where e contract was voidable, even though rescinded by e plaintiff. This exception to the rule was illusated where the plaintiff was a minor when he made contract to perform services, and after he had perrmed part of the services, which defendant acpted, the plaintiff rescinded the contract, and revered in general assumpsit for the portion of the rvices which the defendant had accepted.[9] (3) here the plaintiff has partly performed his conact and the defendant prevents its completion, or s completion is prevented by some act of an overwering force, or by law, in such a way as to excuse e plaintiff from its completion, general assumpsit ll lie. (4) Where the plaintiff has performed the ecial contract, and has also done additional acts or

[9] Moses v. Stevens, 2 Pick. 332 (Mass.).

furnished additional goods at defendant's request general assumpsit lies for the additional work or goods. (5) In a few states, where the plaintiff has acted in good faith, he can recover on general assumpsit for the work done on a partially performed contract.

There are numerous close distinctions as to the use of this writ, or the writ of debt, as to whether to sue on special or general assumpsit, but in a close case the lawyer will always make a rigid investigation of the law applying to his particular facts, especially the decisions of his own state. The above will be sufficient to determine all but the close cases.

39. **Covenant.**—The action of covenant lies for the breach of a contract under seal, signed by the defendant, whether the damages are liquidated or unliquidated. When the damages are liquidated the plaintiff may bring his action either in debt or in covenant. When the damages are unliquidated the plaintiff has but the one remedy of covenant. Damages are liquidated when their amount is certain and fixed by the terms of the contract. When the amount of the damages is uncertain and must be proved by evidence, they are unliquidated. The action of covenant cannot be maintained where the instrument is signed only by the plaintiff, as for the purchase money due for land conveyed under seal. In that case the action must be in assumpsit. To support the action of covenant there must have been a promise by the defendant under the defendant's seal.

40. **Debt.**—The action of debt lies where the plaintiff seeks to recover a definite sum of money

ue him from the defendant.[10] The sum must be efinite and certain, as debt can never be maintained r the recovery of unliquidated damages. Debt will e on any contract where the sum recoverable is efinite and certain, whether the contract is written unwritten, under seal or parol. Debt will also lie n a judgment, an award of arbitration, a penalty coverable under a statute, or any other obligation pay money where the amount to be recovered is rtain and there is a promise, or the law will imply promise to pay a definite sum. Where a contract is ayable by installments the ordinary and general rule that there can be but one action, after the whole mount has become due, upon default of all the payents. This general rule does not apply where the linquent installment is a definite sum due on a day rtain, as the payment of rent, or other contract here each payment is of a certain sum on a day certin. In other cases of the default of installments of contract where the whole amount is not yet due, sumpsit, and not debt, is the proper remedy to enrce payment.

41. **Account.**—The action of account lies to reover the balance due where the defendant has reived goods or money from another. This action es to obtain an accounting between the parties and recover the balance due, where the amount is unrtain and unliquidated. The action may be maintined on either an express or an implied promise. he action is also known as account rendered. This

[10] United States v. Colt, Peters C. C. 145 (U. S.), LEADING ILLUSTRATIVE SES.

action is supplemental to the action of assumpsit where the amount is unliquidated, so that debt will not lie, as debt is supplemental to assumpsit and covenant, where the amount due is certain. The action of account is not now used to any great extent, as the plaintiff usually makes use of the action of assumpsit, or brings a suit for an accounting in a court of equity, if the action of assumpsit will not furnish complete relief.

The preceding four common law actions are the personal actions on contract now in use. The student should always investigate the statutes and decisions of his own state to see if any of the common law provisions are either supplemented or modified by those statutes.

42. **Torts — Classification—Exemptions.**— There are, as already stated, five common law actions for torts. These actions are: (1) trespass; (2) trover; (3) trespass on the case; (4) detinue; and (5) replevin. These actions will now be considered in the order in which they are named. Some of the main differences between actions in tort and actions on contracts will first be briefly discussed, with some of the characteristics of each. In the first place it must be remembered that an action on contract does not necessarily imply any wrong intent or even any positive wrongdoing on the part of the defendant. The defendant may have made the promise with the best of intentions, and used his utmost efforts to comply with its terms, and failed only by reason of his inability. On the other hand, a tort implies that the defendant has damaged another, his property or his

rivilege, without right or consent of the damaged erson, and that the wrong was either willfully or egligently done. By reason of the difference in the asis of the actions it is sometimes harder to make roof of an action in tort than it would be to make roof of an action of assumpsit. Also, by reason of ne different basis of the actions, most of the states istinguish in the relief furnished, especially where ne defendant is of small means, as to the rights of xemption and of bankruptcy. Most of the states ive a liberal exemption from executions issued on udgments on contracts to their citizens with fami-es. This exemption in some states extends to all tizens, and in some to all householders. There is rdinarily less leniency shown to the judgment ebtor who has suffered a judgment in damages for ort. The bankruptcy laws also recognize the dif-erence between judgments which have been recov-red on contract and those on tort. For these and her reasons too numerous to mention here, a judg-ent for tort against a defendant of small means is ore valuable than one on contract. The student ill obtain a more complete understanding of these ifferences in his study of the subjects of contracts, orts, judgments, and executions. In the study of leading our chief object is to learn how to obtain a udgment.

43. **Trespass.**—The action of trespass lies to re-over damages for an injury sustained by the plain-ff, as the immediate consequence of some wrong one forcibly to his property, person, or rights in elation thereto, by the defendant. The action can

be maintained only where the injury is committed with force, either actual or implied. An assault and battery or the injury of the plaintiff's building or other property by force, are illustrations of actual force. The same rule applies if the injury is done to the plaintiff's servant, or to any of the rights of the plaintiff. Force is implied where the injury is the direct result of a wrongful act, as when a fire is started and as an immediate consequence the plaintiff's property is destroyed or damaged.[11] Force may also be implied where the defendant seduces or entices away the wife, daughter or maidservant of the plaintiff, for the law will imply force even if the act be done with the woman's consent, she having no power to consent to an invasion of the plaintiff's rights; though in that case the suit may be brought either in trespass or trespass on the case. Force is also implied if a person goes upon the land of another ever so peaceably but without right, or in case of false imprisonment without actual force, as by locking the door after plaintiff has been decoyed into a room. The injury must be caused by some act done, for the action will not lie for a mere failure to perform a duty. In short, the action is for a positive wrong and not for a mere neglect to act. The wrong must be to some tangible thing, and cannot be a wrong against an intangible property or right, as a franchise or a mere easement of right of way, against which no force could be exerted.[12] A person who enters lawfully and after entry commits a trespass be-

[11] Jordan v. Wyatt, 4 Gratt. 151 (Va.); Akerley v. Haines, 2 Caines 292 (N. Y.).

[12] Dietrich v. Berk, 24 Pa. St. 470.

omes a trespasser from the first entry (termed tres-
ass ab initio, i. e., from the beginning), as where an
fficer serving a lawful writ abuses his authority.[13]

44. **Same subject—Direct force as an element.**—
The action of trespass cannot be maintained unless
the injury is the direct result of actual or implied
orce. It cannot be maintained for a mere conse-
quential injury, as where the defendant put a rock
n the highway and a traveler was injured by con-
act with it.[14] But if the defendant puts a force in
notion and that force injures another, he is liable in
respass, even though the force goes beyond his con-
rol and with different results from that intended by
im. It has been held that when defendant went up
n a balloon and afterward came down and was en-
angled in the trees on plaintiff's land and there
alled for help, he was liable in trespass for the
njury done by the crowd which came upon plain-
iff's land, both from curiosity and to assist him.[15]
t has also been held that where a lighted squib was
hrown into a crowd and those near where it fell, one
fter another, tossed it from them until it exploded
nd injured the plaintiff, the defendant who first
hrew the squib was liable in trespass, as the acts of
he others were a mere continuance of his act, and
one in self-defense.[16]

45. **Same subject—Possession of property in-
ured.**—Where the trespass complained of is an in-

[13] Abbott v. McCartney, 1 Holmes 80 (U. S. Cir. Ct.), LEADING ILLUS-
RATIVE CASES.

[14] Green v. Belitz, 34 Mich. 512.

[15] Guille v. Swan, 19 Johns. 381 (N. Y.).

[16] Scott v. Shepherd, 3 Wilson 403, 2 W. Bl. 892 (Eng.); Smith Lead.
ases 797 (8 Am. ed.).

jury to property, the property must have been in the possession of the plaintiff at the time of the injury. This possession may be either actual or constructive, but it must be a present possession. The action of trespass is based upon an injury to the possession. This rule is so strong that a possessor of the property may maintain trespass against a wrongdoer, and the wrongdoer cannot defend by proof that plaintiff's right of possession was but a temporary right. If the owner of the reversion, not having possession, wishes to bring the action he must sue in trespass on the case, and not in trespass. The fact that the plaintiff has given up the possession of the property to another before action is brought, does not furnish any defense to the action. If the property is in the hands of a servant or other person under the command of the plaintiff, the possession is still constructively in the plaintiff. In the case of land occupied by a tenant at will, the decisions are conflicting as to whether or not trespass will lie as a remedy for the owner, some cases holding that the possession is constructively in the owner, while others hold that it is not. When no person is in possession the owner of the legal title is held to be in constructive possession. A railroad or other common carrier, the bailee, and even the finder of goods may maintain trespass against a wrongdoer using either actual or implied force to the injury of such property.

46. **Trover.**—The action of trover (sometimes called trover and conversion) lies for the conversion to his own use by defendant of personal property in which the plaintiff had a general or special owner-

ship, and of which the plaintiff had possession or to the possession of which he was entitled. The object of the action is to recover the value of the property, and not the property itself. If the plaintiff wishes to recover the property itself he should bring either detinue or replevin. The action of trover originally was brought to recover the value of personal property lost by the plaintiff, which was found by the defendant and then converted to his own use. The courts afterward held that the defendant could not defeat the action by showing that he had wrongfully taken the property instead of having found it. The action was thus extended to all wrongful conversions of personal property. The gist (substance) of the action is the conversion of the property, and the allegation that the property was found cannot be denied and need not be proved. The action goes on the presumption that the property was lawfully obtained, but it may be maintained for the conversion, however the property was first obtained by the defendant.[17]

47. **Same subject—Essentials of cause of action.**—The action of trover can only be maintained for the conversion of specific personal property, and cannot be maintained for injuries to land, or the removal and conversion of fixtures, growing crops, standing timber, or other incidents of real estate. When there has been a constructive severance of fixtures, etc., as in case of a mortgage of growing crops, or questions between landlord and tenant in regard

17 Simmons v. Spencer, 3 McCrary 48 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

to crops, the action of trover will lie. The property must be specific personal property, definite and certain, and it may even be certain specific money; but trover will not lie for the collection of a debt or for money had and received generally. The plaintiff need not be the sole owner of the property, as he may recover for his part of the property owned in common; but he cannot recover from his co-tenant for a mere exclusion, and without a conversion. The plaintiff need not be the absolute owner of the property converted, as any special ownership in the goods, such as the right of a sheriff holding them on execution, will support the action. The plaintiff must have had either an actual or a constructive possession of the property, or he cannot maintain the action. Thus, where goods were leased with a house and afterward they were sold by the sheriff on an execution against the lessee, they were not in the possession of the owner to support his action of trover,[18] and he should have sued in trespass on the case. Where goods are bought and there is no delivery the buyer's remedy is against the seller in assumpsit, and the seller must proceed against a wrongdoer converting the goods. Ordinarily the facts which will support trespass will also support trover, and vice versa; but trespass will sometimes lie where an action of trover will not, as where there has been a taking, but it was followed by abandonment without a conversion, taking being sufficient to support trespass, while conversion must be shown to support trover. Trover will sometimes lie where

[18] Gordon v. Harper, 7 T. R. 9 (Eng.).

respass will not, as where a bailee having the lawful ustody of goods sells or otherwise converts them. ut a mere detention of goods without a demand is ot a conversion. In trover the plaintiff must show ach of the following elements: either a general or special property in the goods; a dispossession or resent right of possession, and a conversion by the efendant.

48. **Trespass on the case.**—Trespass on the case s used to recover damages where the injury is not ccompanied by force, or results indirectly from a rong done by the defendant, or where the owner is ot in possession at the time of the injury.[19] This ecessarily carries with it all of the following cases: 1) Where the thing injured is so intangible that t cannot be the object of force (such as a franchise, ight of way, etc.); (2) where the injury was not mmediate but consequential (such as leaving an obect in the highway whereby plaintiff drove or ran gainst it and was injured, or otherwise creating a ondition which caused injury); (3) where the plainiff owned but a reversionary or other property in he thing injured, less than the whole title, whereby he plaintiff was not in possession, either actual or onstructive, of the thing injured. This action, hough properly named trespass on the case, is comonly called case. The action may arise from the onduct of the defendant in any of the three ways ollowing: (1) By the failure of the defendant to do ome act he was under a duty to do; (2) by the de-

[19] Emigh v. Pittsburgh, Fort Wayne and Chicago Railroad Company, Biss. 114 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

fendant doing in a wrongful and improper way an act which he might lawfully do in a different and proper way, or which he was under a duty to do in a different and proper way; (3) by the defendant doing some act which he had no right to do in any manner. The injury may be either to the absolute or relative rights of a person, or to any of his property, tangible or intangible.

49. **Same subject—Distinctive features of action on the case.**—This action was originated to supply a remedy for those wrongs which were not covered by the old original common law actions. It serves as a supplement to the actions of trespass and trover. When the possession of the property is not such that trespass or trover will lie, or where the property is so intangible that it cannot be the object of force, or where the injury is otherwise not the direct result of the force, the plaintiff must rely upon the action of trespass on the case. The question of the directness of the injury as a result of the wrongful act, and whether the injury was the result of omission or commission, has caused most of the confusion among students and lawyers in distinguishing and making use of the actions of trespass and trespass on the case. The general line of division between them might be stated thus: if the injury is the result of an overt act affecting tangible property of which the plaintiff is in possession, the remedy is trespass, while if it is a failure to act in such a way as to fulfill a legal duty of the defendant, or the plaintiff is out of possession, or the property is intangible, the remedy is case. Thus, it has been said that if one turns

savage beast loose and it does an injury the action is trespass, while if he keeps a wild beast which escapes and does injury the remedy is case; for the first is the result of force set in motion by the act of the defendant, while the second is merely a failure sufficiently to control a force in possession. All injuries which are the result of defendant's negligence, or where it cannot be said that the force started by the defendant reached to and caused the injury, must be recovered for by an action on the case. Where the action of trespass or trover (or both) is applicable the plaintiff should not attempt to maintain trespass on the case. But where the defendant has merely failed to do an act which it was his duty to do for the plaintiff (as where an officer fails to perform a duty for plaintiff to plaintiff's injury), or defendant has indirectly caused an injury (as by causing a malicious prosecution of plaintiff on a criminal charge), the remedy is trespass on the case. Where the negligence of defendant's servant causes an injury the remedy must also be trespass on the case. Where the statute provides for the recovery of a penalty and no other remedy is provided, case is a proper remedy. In a few instances both trespass and case will lie. The student should in all close cases make an examination of the law of his own state before attempting to determine which is the proper remedy in the given case.

50. **Detinue.**—The action of detinue lies where the plaintiff seeks to recover specific personal chattels from the defendant, together with damages for their detention. If the chattels cannot be returned

the plaintiff may recover their value, together with damages for their detention. The plaintiff cannot maintain the action unless he has some right to the immediate possession of the chattels sued for. The gist of the action is the wrongful detention of the chattels, and it lies for their recovery whether they were rightfully or wrongfully obtained by the defendant. Unless the detention is unlawful of itself, without any demand for their return, the plaintiff must plead and prove a demand on the defendant for the goods to support the action. The action can be maintained only against those having actual possession of the goods. The goods sued for must be specific certain personal property, and the action cannot be maintained for the recovery of fixtures or other part of or interest in real estate. The plaintiff may maintain the action on either a general or a special property in the goods against a wrongful withholder of them. In some states the action of detinue is to a certain extent combined with the action of replevin, by the enactment of statutes modifying these actions.

51. **Replevin.**—The action of replevin lies to regain the possession of personal chattels which have been wrongfully taken and are wrongfully detained by the defendant, together with damages for their detention.[20] In most states, by statute, the action also lies where the defendant obtained the rightful possession of the goods, but wrongfully detains them. The action of replevin, like detinue, lies to obtain possession of personal property only, and not of fix-

[20] Williamson v. Ringgold, 4 Cranch 39 (U. S. Cir. Ct.).

res or other part of an interest in real estate. The aintiff cannot maintain the action unless he has e present right of possession of the property, and e property must be certain specific chattels capable description and identification. The chattels must wrongfully detained by the defendant, and where ot wrongfully taken the plaintiff must plead and ove a demand before the commencement of the tion. The action originated in the tenant's action recover goods wrongfully distrained by the landrd for rent, but long since was broadened to allow any owner the right of recovery of any personal roperty wrongfully taken. In most states the old ommon law action has been superseded by a statuory action to recover possession of personal goods, hich adopts many of the characteristics of the comion law action of replevin.[21]

52. **Same subject—Immediate possession of goods.**—The primary object of the action of replevin is to nable the plaintiff to take immediate possession of he goods at the commencement of the action, without waiting for a trial and the decision of the court, while in detinue a plaintiff, suing for the recovery f specific goods and damages, is compelled to wait ntil the court has rendered a judgment before he an gain possession of the goods on a legal writ. At ommon law the plaintiff obtained the original writ f replevin from the court of chancery, commanding he sheriff to seize the goods described in the writ nd deliver them up to the plaintiff, upon his giving sufficient bond to prosecute the suit and return the

21 Ricketts v. Dorrel, 55 Ind. 470, LEADING ILLUSTRATIVE CASES.

property and pay damages if he was not entitled to its possession. If the sheriff could seize the property he did so and delivered it to the plaintiff, who was liable on his bond to the defendant for any violation of his right to its possession. If the goods could not be found by the sheriff to return them to the plaintiff, the plaintiff still prosecuted his action, and if he proved his right he was given a judgment for their value and damages for their detention. The declaration was not filed by the plaintiff until after the return of the writ by the sheriff, so that the declaration was worded differently in different cases to show whether the plaintiff had received the goods or whether they were still in defendant's possession.

53. **Same subject—Conditions of obtaining writ.** —Afterward, the original writ was abolished, and the plaintiff commenced his action by filing his declaration, and at the same time requested the sheriff to seize the property and deliver it to him, which he did upon the plaintiff giving him a sufficient bond for the return of the goods and damages. In this country the action is generally governed by statutes, some of which require a bond to be filed with the clerk before the writ is issued, and some require the sheriff to take and pass upon the sufficiency of the bond. Many of the states require an affidavit by the plaintiff or by someone in his behalf, showing the plaintiff's right to the goods, as well as a bond for the return of the goods and damages. All of these precautions are provided as a safeguard against the unwarranted use of the writ, and to protect the defendants from injury by its unwarranted

e. In some states the actions of replevin and tinue are combined, under statutory provisions, aking one action for relief either with or without nd, depending upon the possession of the goods nding the action. The action of replevin, like tinue, applies only to the recovery of personal operty. As in detinue, the plaintiff must show ch title in the property as entitles him to its possion. At common law the action of replevin would only where there was a wrongful taking, and here that rule still prevails the plaintiff is still quired to plead and prove a wrongful taking. In any states, by statute, replevin will lie where the ods were rightfully taken but are wrongfully withld; but in that event the plaintiff should plead and ove a demand before action, to establish the wrongl detention. Replevin is an action of such powerl force in its first instance and so liable to abuse taking property where the right is not clear, that e courts are loath to add to its scope or to reduce e requisites necessary to its use, and the reader ould examine the statutes and decisions of his own ate and fully reinforce himself in its essentials.

54. **Mixed actions.**—The mixed actions in use day are three in number, as follows: (1) Ejectent. (2) Writ of entry. (3) Forcible entry or deiner. The action of ejectment is an old common w mixed action, and is in common use in the United ates. The writ of entry is an old common law real tion which has been abandoned in most of the risdictions, but is used to some extent in a few ates as a mixed action. It has been considered in

a former section of this subject.[22] The action of forcible entry or detainer was originated during the reign of Henry VI, and is used to some extent in most of the states of this country. We will consider the actions of ejectment, and of forcible entry or detainer, in the order named.

55. **Ejectment.**—The action of ejectment lies for the recovery of possession of real estate wrongfully held by the defendant, together with damages for its wrongful detention. It is a possessory action, wherein the present right of possession is the gist of the cause of action. The plaintiff is required to show such legal title to the land as shows his right to the present possession, but mere proof of former possession is sufficient as against a wrongful intruder and trespasser. The action was originated to give a tenant who had been ousted of possession a writ whereby he could regain the possession, and was not originally intended to try the title to the land. Afterward by legal fictions, it was resorted to as a quick method to escape the slow processes of the common law real actions.[23] It is largely governed by the statutes of the several states, but most of these statutes still recognize the principal characteristics of the common law action, as stated in this and the next section.

56. **Same subject—Essentials of action of ejectment.**—In the action of ejectment the plaintiff must show that he was once in possession and was dispossessed, and still has the right of possession, and that

[22] § 34.

[23] Stephen, Pleading (4th Am. ed.) * pp. 11-13, 32.

defendant is in possession without right. The ion is brought against the person then in pos- sion. In most states the action may be brought ner against the landlord or the tenant, where one ds or assumes to hold the title, and the other ds possession under him as against the plaintiff. common law the action was against the tenant possession, who implicated the title of his land- d. In suits brought to try title the action would by John Doe, as the tenant of the claimant who ught suit, against Richard Roe, as the tenant of adverse claimant, who would implead the title his supposed landlord, and thus put the title in ne. Any legal title to the land supporting the ht of present possession is sufficient for a re- ery, but the plaintiff must recover on the strength his own title, and not on the insufficiency of the e of his adversary. In other words, if the plain- does not show his own right to the possession it kes no difference whether the defendant has any ht or not. The title must be a legal title, entitling intiff to possession, and not a mere beneficial in- est in the land. At common law only nominal mages were allowed, and the plaintiff was required bring another action for the rents and profits ring the time the land was wrongfully held by defendant. Under the statutes, in most juris- tions, full relief is now given in the one action, the intiff recovering damages for the rents and profits oyed by defendant.

57. **Forcible entry or detainer.**—The action of cible entry or detainer was not known to the com-

mon law, but was originated some five hundred years ago, during the reign of Henry VI of England.[24] It lies for the recovery of lands taken by force and for damages for taking and detaining them, and also to recover possession of lands of which the party in peaceable possession, without right, uses forcible means to keep possession and to exclude the owner. It is regulated by the statutes of the several states. There are but two questions involved under most of these statutes, which are: 1. Whether or not plaintiff was in possession of the premises. 2. Whether or not that possession was invaded by force, or was unlawfully invaded, and the wrongful possession thus acquired is held by force, and plaintiff is still excluded from the premises. The force may be implied from threats or putting in fear, or from nailing up the doors and windows to exclude plaintiff. Also intruding upon the rightful possession of another, though peaceably, and then keeping possession by force or threats give ground for this action. The title of the property is not in issue, as the act is aimed to promote the peaceful affairs of life, and to prevent one peaceably enjoying lands from being summarily driven therefrom, or one who is temporarily absent from his premises from being excluded by an intruder. It is a quick, simple action, wherein the use of force to accomplish or prolong the dispossession is the gist of the action. The student should read the statutes of his state governing this action, and examine the decisions construing the statutes, before attempting to use it.

[24] 3 Blackstone Commentaries (Cooley's 3rd ed.) 179.

58. **Forms of pleading to be followed.**—In all the states where the common law still controls the rules of pleading, the remedies which are afforded by the common law are the proper remedies to pursue. The student should examine some recognized work on common law forms applicable to his state, and carefully follow those forms when he attempts to prepare a common law pleading. This is not only wise because of the care and knowledge with which these forms were prepared, but because many of the words and much of the language used has acquired a legal meaning broader than its grammatical meaning. After the student has been in practice for twenty or more years there will be sufficient time for him to attempt an improvement of these forms, accepted and followed by the learned practitioners of his state. With the foregoing general suggestion, we will leave this phase of actions at common law, and take up other questions pertaining to the subject of pleading.

CHAPTER V.

PROCEEDINGS IN OTHER COURTS AND EFFECT OF THE CODE ON FORMS OF ACTIONS.

59. **Common law actions and suits in equity compared.**—The actions described in the preceding chapter are the ancient common law actions. Under the old English practice there also existed the court of chancery, which gave equitable relief to those persons who could not obtain adequate relief in a court of law. Equity has been defined as "The correction of that wherein the law, by reason of its universality, is deficient." But it is really a coordinate system of law, giving remedies in certain cases not provided for by the rules of the common law. Equity, under the English system of courts, was administered by the court of chancery. The chancellor was supposed personally to represent the king, and to have the keeping of his conscience, to grant relief when the king's general laws were such that they would cause an injustice. The original writs in common law actions were issued out of the court of chancery, commanding the common law courts to render justice under the laws of the king, as provided by the particular writ. This was the proper remedy where the common law and the methods used by the law courts furnished adequate relief. Where the common law did not furnish an adequate remedy, or the procedure used in the law

courts did not enable them to enforce a decree affording relief, the subject made his appeal directly to the chancellor, asking him personally to hear and determine the case. Under the earliest holdings of the chancellor this relief was wholly a matter of discretion, governed solely by the chancellor's conscience. After numerous petitions had been entertained and many cases decided by the chancellors, the practice began to crystallize into a known and definite procedure with certain defined rights of relief and certain defined defenses. Before the practice was as clearly defined and limited as it has since become, it was jeeringly said that for a chancellor to undertake to measure relief only by his conscience was more unreasonable than to attempt to measure it by the size of his foot, since consciences differed more than feet. But this jibe was unmerited, for the courts of equity really administer a system of established principles according to fixed rules, both the law and the procedure being adapted in great measure from the civil law which prevailed in the Roman Empire.

60. **Courts of equity.**—The chancellor heard and decided cases without the help of a jury and exercised a considerable discretion in giving or withholding relief under stated facts, though he could always take the advice of a jury for his own information when he chose to do so. Among the numerous things which the chancellor would hear and decide were petitions to correct deeds, where the intent of the parties was not expressed and there was excusable mistake in executing such instruments; to order

the specific performance of contracts, where they could be performed by the execution of a deed or other act which it was not too great a burden on the court to require done, and where the party asking for relief was without other adequate remedy and the right was clearly on his side; to issue injunctions; and to make such other orders as the equity of each case required, in good conscience, to be made. The petitioner (plaintiff), when he asked this extraordinary relief from the chancellor, was compelled to show himself fully entitled to it and without an adequate remedy at law. When he came into a court of equity he must show that he was himself without fault, for he "must come into equity with clean hands," or he would not be given relief. In his petition he was also compelled to show that he had either done all on his part to be performed, or, being prevented from doing all of his part, he must offer to do what it was his duty to do, since "he who would seek equity must do equity." The maxims quoted are among the many rules by which courts of equity have always been controlled in granting equitable relief, but which cannot be taken up in detail in this article.

61. **Code systems of pleading.**—In this country the same court usually administers both legal and equitable relief. Where the pleadings are still governed by the common law there are separate forms and a different practice in proceedings at law and in equity. The lawyer may one day appear before the judge and a jury, or the judge sitting alone, in an action at common law (such as an action in

trover), and the next day he may appear before the same judge sitting alone as a court of equity in a suit involving the right to an injunction or other equitable relief. In such event, where the court is in a code state, the form of the pleadings in each case will be the same, alleging the ultimate facts, but the pleadings in the common law action will be much shorter than the equity pleadings, since fewer facts are ordinarily required to establish a right at law than are needed to show a right to extraordinary relief in equity. In his pleading before a court on its equity side the plaintiff must state all of the facts showing his rights in the case, and must also show himself entitled to relief in a court of equity, alleging facts which show that he is without a remedy at law, or that the remedy at law is wholly inadequate, that the wrong complained of is not due to his fault or omission, and that he has not withheld any of the rights of the defendant, and all of the other facts which go to show that he is entitled to that particular relief under those particular facts. Where the proceeding is in a court governed by the old common law rules and the equity rules of pleading, respectively, in the different kinds of cases, there will be still greater difference in the length and even in the form of the pleadings. In all of the states a difference between common law and equitable relief and in the administration of each is still recognized. In all it has been found that some matters cannot be governed by rigid and unyielding rules, and that a limited amount of discretion must sometimes be exercised to reach a just result. For this reason the

discretion of a chancellor is still vested in judges to some extent in deciding equity cases; but a discussion of the rules of equity pleading is foreign to the subject of this article.

62. **Divorce and special statutory proceedings.**— The subject of divorce is controlled entirely by statute, as the old English law was opposed to the granting of divorces, absolute divorces being granted only by act of Parliament. Control over the subject of marriage was left to the ecclesiastical (church) courts, which, until the time of Henry VIII, were under the control of the Roman Catholic Church. But that church, as well as the present Established Church of England, do not countenance divorces. Each state in this country provides by statute what shall be the grounds for divorce, and what residence is required of the party seeking a divorce, what may be decreed regarding the rights of alimony and the custody and care of children, and all of the other matters which are incident to the breaking of marital vows, except so far as the common law rights of husband and wife are left to control. A lawyer who will thoroughly master the general rules governing the laws of pleading, so that he can prepare proper and sufficient pleadings in other matters, may look to the statute governing the subject of divorce in his state and prepare the pleadings for that proceeding. There are also other statutory proceedings, such as proceedings relating to drainage, highways, and other special matters, which cannot be considered in a general work. But with a knowledge of the general law of pleading in mind and with the statute pro-

viding for the particular proceeding before him, the lawyer will find no difficulty in preparing his pleadings and other papers in any statutory proceeding.

63. **Codes—Modification of the law of pleading.**—In many of the states codes of procedure have been adopted which change as well as codify the law of pleading. The courts of these states, with but few exceptions, hold that the codes only change the rules of the common law in so far as they conflict, leaving the remainder of the common law rules still in force. The various codes, to a great extent and in a general way, follow the codes of the states of New York and California. The code of New York was the first code of procedure adopted in this country. It was adopted in 1848, and several of the states soon after adopted codes to a great extent patterned after the New York code. The state of California afterward adopted a code containing the main features of the New York code but with very extensive modifications. The states east of the Missouri River, depending largely upon New York decisions, took the New York code as a basis from which to draft codes, as one state after another adopted them, while the western states, depending largely on California decisions, were inclined to take the California code as a basis in the preparation of their codes, and some of them enacted it almost in its entirety.

64. **Actions under the code—Forms of action abolished.**—Under all of the various codes it is provided, in substance, that there shall be but one form of action, which shall be known as a civil action.[25]

[25] Getty v. Hudson River Railroad Company, 6 How. Pr. 269 (N. Y.), LEADING ILLUSTRATIVE CASES.

All of the codes require that the parties shall state the facts constituting their respective causes of action or grounds of defense in plain and concise language, and in such a manner as to enable a person of common understanding to know what is intended. The form of action no longer controls, but the facts alleged must be sufficient to constitute some cause of action for which the law allows a recovery. Thus, in replevin or detinue, where the defendant obtained lawful possession of the goods, a demand before the action was begun must be alleged and proved, both at common law and under the code (unless the holding is shown to have otherwise become unlawful), since every necessary element of the action must be alleged under any form of pleading in stating the plaintiff's action. This rule requiring the statement of each necessary element of the action or defense pertains to each action and defense. Under the common law certain forms had acquired a legal meaning, and the particular form was required to reach a particular relief. Under the code the pleader is not required to confine himself to any set form of words, but he must state facts showing the existence of some cause of action or some defense to the action, to constitute a sufficient pleading. The various codes are intended to do away with forms and fictions of law, and to provide for one procedure, so far as possible, on both the law and equity sides of the court. It was the intent of the authors of these codes to make the pleadings honestly present the rights of the parties upon the facts of each case by requiring them merely to state those facts. The codes are not intended to

change the rights of the parties; that is, to give any person a right of action where none otherwise exists, nor to permit a defendant to escape liability where liability exists under the law. They were adopted merely to make straight the legal paths of pleading which the authors of the codes believed to be too devious and roundabout. Some attorneys contend that codes are a great improvement upon the common law pleading and equity pleading, especially by doing away with a double practice, while others contend that states with practice acts which merely modify the common law system of pleading in specified matters of detail have a better form of pleading. The student must accept in his own state what its legislature has provided.

65. **Same subject—Ultimate facts to be alleged.** —The ultimate facts are what the codes require to be pleaded, not the evidence to establish those facts, nor the legal conclusions deducible from those facts. Thus, a person should not state the various matters of evidence by which he expects to establish his cause of action or defense, but should state the ultimate facts which he expects to establish by that evidence. On the other hand, he must be careful to state the ultimate facts, and not merely the legal conclusions deducible from those facts, as alleging a conclusion does not make a complaint or answer sufficient in most jurisdictions where codes are in force. Thus, an allegation that you heard defendant's voice in a room would merely allege evidence that he was there, as it might have been a phonograph. You should allege that defendant was in the

room if that fact is material. Also an allegation that if defendant had done certain acts plaintiff would not have been injured would state a mere conclusion, not a fact. Where a person brought an action for the breach of a covenant of warranty in a deed, and alleged that the lands were mortgaged when sold to him, and that the mortgagee, by virtue of the power of sale contained in the mortgage, "sold and conveyed" the lands to another, it was held that the complaint was insufficient. The court said that the complaint should have alleged the facts showing that the mortgagee complied with the power of sale, by the giving of notice and otherwise, so that the deed which he executed actually conveyed the title, and added that the allegation that he "sold and conveyed" was a mere conclusion.[26] Although but few cases go to such an extreme as the above case, it illustrates the rule that the facts, and not the legal conclusions deducible from the facts, should be alleged. Where there is any question whether an allegation is of a fact or a conclusion, the young pleader will do well to examine some of the decisions of his own state bearing on that particular question, and thus to crystallize in his mind the application of the rule.

66. **Facts must be stated; not conclusions nor matters of evidence.**—Under the common law rules of pleading matters were stated according to their legal effect, while under the equity rules of pleading the facts in detail were set out in the pleadings. The code attempted a combination of these two

[26] Clark v. Lineberger, 44 Ind. 223.

methods of pleading so as to compel the ultimate facts on which the rights of the parties must depend, to be alleged. This rule requires that the lawyer shall know all of the elements necessary to constitute each cause of action or defense, and that facts showing each of those elements shall be alleged to present his client's cause. It requires the plaintiff's attorney to know and allege in his first pleading facts showing each element of a cause of action upon the legal grounds on which he wishes to base the action. It also requires the defendant's attorney to know each necessary element of the action and the elements of a defense necessary to defeat that action, and to state in an answer the facts constituting the cause of defense. In the early decisions under the codes many cases are to be found where the party would lose sight of the rule that he must state the ultimate facts, and would only allege the legal effect of the facts, as required by the common law, or would only plead the evidence by which he hoped to establish those ultimate facts. By reason of this the early reports under the codes are filled with decisions holding pleadings insufficient. The young pleader can avoid this difficulty by a little study of the decisions of his own state, and by carefully studying and following some good book of forms prepared for the use of lawyers in his state. At present there are sufficient decided cases to make the path reasonably clear to any mind if the cases are all studied and understood. Each lawyer must in the end study and gain a general knowledge of the law of pleading governing his own particular state. No general work

on pleading can give the rules pertinent to each of the various states under the code, or under a practice act in force therein. Neither the code, the common law, a practice act, nor any other mode of procedure devised by man can make it possible for the ignorant to do well what requires the best efforts of the learned and wise; but the young lawyer, by diligent effort and study, may overcome almost every difficulty and be able to prepare a sufficient pleading under either method of procedure.

67. **Kind of action brought determines right of recovery.**—Although the use of special forms of actions is abolished by all of the different codes, a plaintiff who undertakes to allege the essential facts of one action, when his evidence will only establish another and different action, is sure to fail under the code, as at common law. Thus, where a carload of iron was shipped over a railroad and evidently was stolen from the car before delivery, and the shipper brought suit under the code, alleging a conversion of the goods (at common law the action would have been called trover), the plaintiff could not recover upon proof which only showed a failure to deliver on the part of the carrier without showing that the carrier had done anything with the iron which it ought not to have done.[27] The action implied a positive wrong and the evidence only established a failure to perform a duty, therefore in the case cited the plaintiff must fail under any proper administration of justice, as failing to establish the wrong complained of. This rule applies to all other

[27] Vandalia R. Co. v. Upson Nut. Co. (1913), 101 N. E. 114 (Ind. App.).

actions; for, though a plaintiff may waive a tortious wrong and allege a lesser violation of duty implied from the wrongful act, he cannot allege and recover for a greater wrong than was actually done, thus implying a greater violation of his rights than there was, which would carry with it a greater liability under the law. The greater of two similar wrongs includes the lesser, but the lesser cannot include the greater, and there must be a similarity whereby the law will imply the lesser from proof of the greater, or the different action to recover for the lesser wrong will not lie. Nor can the plaintiff who has chosen the wrong action, as by suing in tort where he should sue in contract, amend his pleading to make it a declaration in the right kind of action, and thus prosecute such new action in continuation of the old one.[28]

68. **Statutes declaring special rules of pleading.** —In the code states some special actions, such as actions to recover land by way of a substitute for ejectment and to recover goods after the manner of replevin, to contest wills, and other actions given by statute, are provided for. The provisions of the statute giving any such action must govern the practice in those cases, rather than the general rules of pleading, but ordinarily the same rules of pleading requiring a statement of the facts which constitute the cause of action will control, except as the statute expressly declares what shall be alleged.[29] The intelligent student will be able to determine whether any other rules are added to the general rules, and

[28] Supervisors, etc., v. Decker, 34 Wis. 378, LEADING ILLUSTRATIVE CASES.
[29] Anderson v. Caldwell, 91 Ind. 451, LEADING ILLUSTRATIVE CASES.

whether a statute giving such an action excuses compliance with the general rules of pleading; if not he should comply with the rules governing an ordinary action. These special actions are provided for because an ordinary civil action is not so framed as to grant the relief required by the special action, and they are not provided for with any purpose to create a different procedure in so far as the ordinary rules of pleading will apply.

CHAPTER VI.

PARTIES TO ACTIONS AND JOINDER OF ACTIONS.

69. **Who must be brought before the court.**—Before any action can be prosecuted the plaintiff must cause notice to be given to all of the necessary parties to the action. A person seeking the decision of a controversy by a court should bring all of the parties necessary to its full determination before the court for a hearing and determination of the matter. Every person having the legal right to control the action must be in court to control it. Where more than one person has an interest in the subject of the action, all having a legal right on either side should be made parties. But if a person interested on the same side of the case with plaintiff refuses to join in bringing the action, the codes permit him to be made a defendant and brought before the court with the rest. At common law the action must be brought in the name of the party having the legal interest, though that was not always the real party whose rights had been infringed. This often required the action to be prosecuted in the name of some person having only the legal title to the property or right, who did not have any beneficial interest in it. Thus, the payee named in a note sued on must be the plaintiff at common law even though he had sold and assigned it or had parted with all the beneficial interest in it he ever had. The codes of the

various states require that an action shall be prosecuted in the name of the real party in interest, except in a few cases, among which are ordinarily the cases of actions by executors, administrators, and trustees of express trusts. Trustees of express trusts are ordinarily held even to include a person in whose name a contract is made for the benefit of another. All who were intended to control the management of a trust matter and whose judgment was intended to be the controlling factor in regard to an affair are included by the term.

70. **Assignment of rights of action.**—The common law, as a general rule, required that in an action on a contract which has been assigned, the action must be maintained in the names of the original parties to the contract. The code changes this rule, and where the assignment is made by indorsement the assignor is ordinarily not even a necessary party to the action. But where the assignment is not in writing, or is made on a paper separate from the contract, the assignor must, in most states, be made a party to the action to answer to his interest, if any, in the contract. In many of the common law states statutes have been passed which modify the rule regarding the parties to actions on assigned contracts. Under the early common law rule, choses in action (claims by contract and otherwise against others) could not be assigned. Under the law now in force in all jurisdictions all rights under contracts may be assigned, conveying a right of action (in the assignee's own name, under the code) against the promisor. This rule does not allow a person under a contract

obligation to escape liability by assigning to another the performance of his contract duty without the consent of the promisee, thus possibly substituting an irresponsible person in his stead; that would promote injustice and not justice. But he may assign his own right to recover. The right of assigning choses in action only enables one to assign rights under contracts. It does not give the power to assign an obligation to perform a contract, or to assign a cause of action for an alleged wrong (an action in tort), such as the right to recover damages for an injury to a person's body. There is a possible exception to this rule in the fact that where the defendant has maintained a nuisance and the property is conveyed, and the defendant still maintains the nuisance, the assignee, by an action to abate the nuisance, may obtain full damages for its maintenance. This is because of the wrongful continuance of the nuisance affecting the grantee's property rights.[30] The right to recover damages for the past maintenance of the nuisance cannot be assigned separate from the property, nor can it be assigned to a grantee of the property if there is not a continuance of the nuisance by the defendant after the property is conveyed. Some states have statutes which even permit the assignment of rights of action in tort which have fully accrued and are of kinds that will survive the death of the plaintiff and defendant.

71. **Joint and several rights and liabilities.**— Under the common law rule all persons jointly inter-

[30] Some v. Barwish, Cro. Jac. 231 (Eng.).

ested must sue together as plaintiffs, and those persons jointly liable must be sued together as defendants, while if there were several parties, each severally liable upon the contract, they could be sued separately. But where there are several persons, each having a right of action, or against each of whom there is a right of action on a distinct and several liability, so that there is no joint interest, the contract, as to them, is several, and each must sue or be sued severally. If the contract is such that the plaintiffs have an option to consider the contract as either joint or several, each must sue separately, or all must sue together, and the suit must be against all of the defendants jointly or each of them separately, depending on which option is exercised. They cannot join a portion of the parties plaintiff, or less than all of the parties defendant. Under the code, all having a joint interest must be made plaintiffs, unless they refuse to join in the suit (when those refusing may be named as defendants to answer to their interest), or except in cases where the parties are so numerous that it is impracticable to join all as plaintiffs. These provisions were borrowed from the rules of equity pleading and did not apply in actions at common law. The code has also changed the common law rule by allowing the plaintiff to sue any two or more of the defendants, where there are several jointly and separately liable on the same contract, instead of compelling him to sue either only one of them or all of them, as at common law.

72. **Parties to actions in torts.**—In actions for

wrongful injury (actions in tort, called actions ex delicto), there is no material difference in the rule regarding the parties at common law and under the code. The only exception is that under the common law the person holding the legal title to property must bring an action for an injury to it, while under the code the real party in interest must bring the action. But this does not ordinarily mean that a person having merely a beneficial interest in the property and no title may bring suit even under the code. Both at common law and under the code, if the injury is joint as to several persons, or if it causes a joint damage, all the injured persons must join in the suit (or under the code the persons refusing to join should be made defendants to answer to their interest). Where there is no joint interest the persons injured by a single wrong should each bring a separate suit for his damages. The plaintiff or plaintiffs may sue one, several, or all of the persons assisting to inflict an injury. He or they may sue a portion of those liable for the tort in one action, and bring one or more actions against all or a portion of the others liable. He may thus prosecute his remedy at his pleasure, and none of the defendants have reason to object that he is not prosecuting other participants, or that he is prosecuting them in other actions. The method of plaintiff's management and prosecution of his remedy is not the concern of one who has done him a tortious wrong, and each of the wrongdoers is liable for the whole of the injury that he joined in causing. In all jurisdictions separate actions against each of the wrongdoers may

be maintained at the same time. In some states the plaintiff may recover as many judgments as he desires against as many of the participants as he wishes, while in some jurisdictions he is only permitted to take a judgment in one action. But he can obtain only one satisfaction for the injury in any jurisdiction, whether it be by suit or settlement. The payment of one judgment for the wrong and its acceptance by the plaintiff always releases all other persons liable for the wrong; and in some jurisdictions any effort to collect one such judgment, as by execution and levy, has that effect, while in others it is only a satisfaction of one of the judgments which will operate as a release.[31]

73. **Misjoinder and nonjoinder of parties.**—Both at common law and under the codes, in actions on contracts, either a misjoinder or nonjoinder of parties plaintiff may be taken advantage of by demurrer when the defect appears on the face of the plaintiff's pleading. Under the code, if there are too many parties plaintiff the grounds of the demurrer should be, in substance, that the facts stated do not constitute a cause of action; but the language of the code should be followed in stating such cause, the assertion being true as applied to any cause of action on behalf of the surplus parties. At common law the question might also be raised by a motion in arrest of judgment. Under the code, when the misjoinder or nonjoinder of parties appears on the face of the pleading and is not questioned by demurrer it is generally held to be waived, though the rulings are

[31] Fleming v. McDonald, 50 Ind. 278.

not uniform. At common law, if the misjoinder or nonjoinder of parties is not shown on the face of the pleading it may be raised by plea in abatement, or at the trial by a motion for nonsuit. The decisions under the codes are not altogether in harmony, but the general rule is that the defect must be raised by plea in abatement or by demurrer, or it is waived. Where the action is in tort the same rules apply regarding the misjoinder of the plaintiffs which apply in actions on contracts. Where the defect is a nonjoinder of parties such defect must be questioned either by a demurrer or plea in abatement, or it will be waived, except that the right of the defendant remains to insist that only such portion of the damages as belongs to the plaintiffs joined shall be awarded.

74. **Same subject.**—Where there is a misjoinder or nonjoinder of the defendants in actions on contract the defect may be raised by demurrer under both the common law and the code. Under the common law it may also be raised by motion in arrest or for a nonsuit. But under the code a failure to question a pleading on the ground of a defect of parties until after verdict is generally held to waive the defect as to all of those liable, though a defendant not liable stands upon the same ground as a party in any action whose liability is not shown. If the defect does not appear on the face of the pleading it should be raised by plea in abatement on behalf of those liable, or it is waived, except at common law in cases where it appears that the omitted defendants who are jointly liable are still living and within the juris-

diction. Any persons not liable and improperly joined may defend upon the merits on the ground that they are not liable, though made parties. No liability is admitted by failing to take advantage of a misjoinder or nonjoinder of parties. In actions in tort a defendant who is liable cannot object because others also liable are not sued. Where more defendants are sued than are liable, the defendants liable cannot object because others not liable are also joined, unless possibly in an action where there could be no joint liability, as in a slander, when it might, in some jurisdictions, be raised by demurrer. The defendants not liable may demur where their defense appears on the face of the pleading, otherwise they may defend on the merits.

75. **Joinder of actions.**—The plaintiff, having determined what action to employ (if he lives in a common law state) or the facts provable in his action and the law governing them (if he lives in a state governed by a code) and having also determined who should be made parties to his action, must then state his cause of action in his first pleading. He must first determine the best method by which he can present his action in the most favorable light before the court and jury. He may also have several actions of the same nature against the same defendant which he desires to join, such as actions to enforce payment of two or more different notes, or he may wish to state one cause of action in several ways to forestall the possible variations of the evidence which may be produced at the trial, which is a practice allowed and followed in many states. By the earliest com-

mon law rules the plaintiff could bring but one action under a single writ. This rule was afterward modified and the plaintiff was allowed to bring suit on several claims of the same nature in the same action, but each must be stated in a separate paragraph of the declaration. This practice of allowing the joinder of actions was established in order that the plaintiff might join distinct and separate causes of action of a kind that could be tried together. The practice was afterward developed of stating the same cause of action in different paragraphs as though each were a separate cause of action, which is still a common practice in some states.[32]

76. **Same subject.**—The practice of stating a cause of action in several paragraphs of the declaration in different ways and under different theories of the law is often employed where the plaintiff is uncertain as to just what the evidence will prove and wishes to state his cause of action in such manner that it will certainly be supported under one of the paragraphs by the evidence brought out at the trial. Thus, in an action for the injury of a person, the plaintiff may state his case in one paragraph, charging defendant with some form of negligence causing the injury; and in a second paragraph he may charge a different act or omission as being the negligence of which defendant is guilty. In a third paragraph he may allege that plaintiff was in a dangerous place and unable to escape, and that defendant saw and was aware of plaintiff's peril in time to prevent the injury, but negligently caused it (seek-

[32] Garland v. Davis, 4 How. 131 (U. S.), LEADING ILLUSTRATIVE CASES.

ing to escape the rule of contributory negligence by this paragraph); and in a fourth paragraph he may allege that the injury was intentionally inflicted by the defendant. In some states the defendant, in the case supposed above, may make a showing that all of the paragraphs count upon the same injury and require the plaintiff to elect on which of them he will rely. In other states the plaintiff may rely upon them all, and on appeal by the defeated defendant may uphold the judgment if the evidence supports any one of the paragraphs of his declaration. The common law rule permitted several distinct causes of action of the same nature and character, or to which the same plea could be pleaded, and on which the same judgment might be rendered, to be joined in the same action. In the several states of this country the joining of causes of action is largely governed by statute. The several states are not uniform as to what actions are allowed to be joined, but the statutes in all of them are intended to permit the joining of those actions which may be tried together without inconveniencing the court or confusing the jury. In most jurisdictions a considerable discretion is given to the trial court in the matter of the joinder and separation of actions. The student must examine the statutes of his own state upon the subject of joining actions to know what is allowed there.

CHAPTER VII.

THE PLAINTIFF'S FIRST PLEADING AND GENERAL RULES OF PLEADING.

77. **Use of forms in preparing pleadings.**—The plaintiff, having determined what action at common law is the proper remedy in his case, or the facts and elements which constitute his cause of action if he is proceeding under the code, and having determined who are the proper parties, plaintiffs and defendants, and whether to make his pleading in one or more paragraphs, is then ready to state his cause of action. In stating a cause of action under the common law a young attorney should be careful to follow the established forms and rules of pleading, and to state all facts which the form books indicate are pertinent and necessary. In stating his cause of action under the code he will do well to consult some good work on forms of code pleading used in his state and to use one of these forms as a suggestion for the statement of his action. But his chief care must be to know which of the facts that he is able to prove will make a cause of action on behalf of his client, and then to allege those facts. In preparing his pleading, either at common law or under the code, the attorney should make each allegation in a positive form, stating clearly facts supporting each element of the cause.

78. **Matters which need not be stated.**—It is one of the essentials of good pleading that "All plead-

ings must contain matter pertinent and material." This rule is applicable to any form of pleading and to every pleading in its order, and in fact to every effort by statements of the matters relied on by each of the parties to reach an understanding of what is the question at issue between them. As was said above, a pleading must allege every substantive fact which is essential to the statement of the cause of action or defense in that particular action. If the law has affixed a definite legal meaning to certain words, as is true where common law forms are required to be used, the allegations should be made in those words. Otherwise the facts may be plainly stated in ordinary language. The facts should all be alleged with certainty and positiveness. The pleader need only allege matters of fact, and need not allege any of the matters which are declared by the law in force in the jurisdiction where the court is held (except when alleged in order more clearly to bring out the force of the facts stated). In short, the pleader need not allege any fact or matter of which the court will take judicial notice, which includes all unquestioned facts of which the whole community has general knowledge or is presumed to know, such as the course of the seasons, boundaries of the state, or any such generally known fact. Neither need the pleading allege in detail the facts necessarily implied from the facts alleged. Nor need it allege facts which the law presumes to be true until the contrary is alleged by the opposing party. This rule applies to all of the pleadings, whether those of the plaintiff or those of the defendant.

79. **Statement of general rules.**—In making these allegations the following rules as to the certainty required in pleadings should be kept in mind:

Rule I. "Pleadings should not be double" (that is, no paragraph should allege more than one sufficient ground of the pleader's action or defense).

Rule II. "The pleading must have a certainty of place" (that is, it should show where the alleged facts occurred creating the cause of action or defense).

Rule III. "Pleadings must have certainty of time" (that is, where facts constituting a cause of action are alleged, the time when they occurred should be alleged, and the same rule should be observed in pleading facts as a defense).

Rule IV. "The pleadings must specify quality, quantity, and value."

Rule V. "The pleadings must specify the names of persons" (that is, where a person is alleged to have done an act his name should be given).

Rule VI. "The pleading must show title" (when title is depended on as an element of the cause).

Rule VII. "The pleading must show authority" (where authority is depended on).

Rule VIII. "Whatever is alleged in a pleading must be alleged with certainty."

80. **Qualifications and exceptions to general rules.**—The rules set out in the preceding section are qualified by the following rules in limitation of the certainty required:

(1) It is not necessary in pleading to state that which is merely matter of evidence.

(2) It is not necessary to state matter of which the court takes notice ex officio. The court takes such notice of all public laws of the state where the action is pending, whether common or statute, but not of private law, unless the statute expressly so directs. Where an action arises in another state, or the law of another state is relied upon, the foreign law must be pleaded and proved as a fact. It is necessary also, in some cases, to make mention of the law of plaintiff's own state for convenience or intelligibility of the statement of facts. As it is unnecessary to state matters of law in a pleading, it is equally improper, when any matter of law is alleged, to make it the subject of traverse.

(3) It is not necessary to state matter which would come more properly from the other side. Thus, it is unnecessary to anticipate the answer of one's adversary. It is sufficient that each pleading should contain in itself a good prima facie case, though whatever is essential to a prima facie case must be stated. But there are certain pleas which are regarded unfavorably by the courts as tending to shut out the truth, and these, such as estoppel, that the other party is an alien enemy, and the like, must be certain in every particular. They must meet and remove, by anticipation, every possible answer of the adversary.

(4) It is not necessary to allege what the law will presume.

(5) It is not necessary to allege circumstances necessarily implied.

(6) A general mode of pleading is allowed where

great prolixity is thereby avoided. The proper extent or application of this rule is largely a matter of the exercise of a practical judgment, only to be gained by study of the precedents.

81. **Same subject continued—Other exceptions to the rules.**—(7) Pleading in the form of general allegations is often sufficient where the allegation on the opposite side must reduce the matter to certainty. Thus, pleading performance in actions of debt on bond may be general; likewise, where the condition is for the performance of covenants or other matters contained in an indenture or other instrument collateral to the bond sued on and not set forth in it. But this does not apply where the covenants or other matters mentioned in the collateral instrument are either in the negative or the disjunctive form, for here the allegation of performance should be more specially made so as to apply exactly to the tenor of the collateral instrument.

In pleading performance of matters contained in a collateral instrument, it is necessary not only to crave oyer of the condition and set it forth, but also to make profert of the collateral instrument and set forth its whole substance. But this rule is greatly modified by statutes in many jurisdictions.

The plea of non damnificatus to an action of debt on an indemnity bond is an example of general pleading on behalf of the defendant.

(8) No greater particularity is required than the nature of the thing which is pleaded will conveniently admit.

(9) Less particularity is required when the facts

lie more in the knowledge of the opposite party than of the party pleading.

(10) Less particularity is required in the statement of matter of inducement or aggravation than in the main allegations.

(11) With respect to acts valid at common law but regulated as to the mode of performance by statute, it is sufficient to use in the declaration such certainty of allegation as was sufficient before the statute. But the plea should show the agreement or other instrument to be in writing if the statute makes writing necessary. Under the code contracts which the Statute requires to be in writing should always be pleaded as written instruments.

82. **Pleadings must not be double.**—The foregoing rules of pleading apply generally to all of the pleadings in the case, including the declaration or complaint of the plaintiff, alleging his cause of action, or the plea or answer of the defendant setting up a defense, and all other pleadings by either of the parties in an effort to overcome any former pleading. We will now take up these general rules as given above and consider each separately. Rule I. "Pleadings should not be double." This rule is intended to promote a single issue. The plaintiff in his declaration should state one sufficient ground for his action, and the defendant one sufficient ground of defense, in each paragraph pleaded. The rule applies to all pleadings in the case. A violation of this rule will make a pleading subject to demurrer in some states, while in others it will make it subject to a motion to separate the causes of action or defense. If a plaintiff

desires to state more than one ground for his action he should prepare as many paragraphs of his pleading as he believes he has grounds of action. Each of these paragraphs should be sufficient within itself as a pleading, and should in no way depend upon any statement in any other paragraph. There is no uniform rule common to all the states regarding the right of stating the same action in several paragraphs. Some states countenance the practice, while in other states it is a matter of discretion vested in the trial court, and it seems that some courts always compel the plaintiff at the trial to elect on which paragraph of his declaration he will rely. If the defendant wishes to state more than one ground of defense he may do so at common law and in all of the states which have adopted codes or otherwise modified the common law rules of pleading. But he must state each separate ground of defense in a separate paragraph, sufficient within itself, and without any dependence whatever upon the allegations of any other paragraph. A few of the states require that the defendant shall swear to the facts pleaded as a defense.

83. **Pleading must be certain as to place.**—Rule II. "The pleading must have a certainty of place." Under all systems of pleading this rule must be observed and followed. It is necessary to observe this rule where the action affects land, to show that it lies within the court's jurisdiction. If the action is not a local action (one affecting the title to land or for some other reason required to be brought within a particular venue) the place should, nevertheless,

be stated with certainty, to inform the defendant as an aid in preparing his defense, and so that the record of the final judgment will bar another action based on the same alleged cause. Under the common law, in transitory actions (those not required to be brought in any particular venue), the place could be alleged under a videlicet (that is, preceded by "to-wit" or "that is to say," which showed that strict proof would not be made), and at the trial the exact place need not be proved as alleged. Under the codes the true place should be alleged in all pleadings, though some states hold its accuracy more important than others, and a variance is not ordinarily material unless the defendant is misled or prejudiced by reason of the inaccuracy of the statement.

84. **Certainty in stating time, quantity, and names.**—Rule III, "The pleadings must have certainty of time," and Rule IV, "The pleadings must specify quality, quantity, and value," and Rule V, "The pleadings must specify the names of persons," merely reiterate the rule that pleadings should be positive and certain. The question of time is governed largely by the same general principles which govern the question of place. That is, that the time should be alleged and a date given for the information of the adverse party and the court, and when it is one of the essential facts of the cause of action special care should be taken to state it correctly. The time stated should show that the cause of action arose within the Statute of Limitations, or it should allege some fact taking it out of the control of the Statute. In stating value it should be stated in money

(dollars and cents). The quality should be stated with such accuracy as the circumstances permit, but such latitude will be allowed as is reasonable under the facts. The quantity should also be stated as accurately as is reasonably possible. In the common law pleadings it is common to state the quantity under a videlicet. In naming persons, as required by Rule V, the pleader should give the correct Christian names and surnames of any persons required to be named. If a plaintiff makes a mistake in the name of a defendant it must be challenged by a plea in abatement, or corrected by amendment on a suggestion of the mistake, or it is waived. If a mistake is made in stating the name of a payee of a note or other persons under whom the plaintiff claims, it will be fatal, as the proof will not support the allegation. Where the pleader depends on a written instrument for proof, the pleading should allege the name as used therein, unless there is a variation in the name as appearing in the instrument and that used in the assignment, when proper explanation of the variation should be made in the pleading. Then in such case it will be well, if the local statutes permit this to be done, to make the original party to the instrument a party to the action, whether he would otherwise be required to be such party or not, and let him answer as to his interest in the contract.

85. **Title and authority must be shown.**—Rule VI, "The pleading must show title," and Rule VII, "The pleading must show authority," both require a pleader who undertakes to set up a right to state facts showing the grounds on which that right is

based. The rule requiring the pleader to show title only requires him to show such title as supports the action. In trespass, for instance, this would be a title showing right of possession, any greater title being immaterial. The usual rule where there is a damage to property is to allege ownership generally, and then to prove the title necessary to support the action. If a specific title is alleged, the general rule is to require proof of that particular title, or of one which embraces the title alleged. That is, if the plaintiff alleges he is the owner in fee of land, although it would have been sufficient to allege and prove a less estate, he must prove that estate or he cannot recover, even though proof is offered which would be fully sufficient had the less estate been alleged. The party does not have to allege the exact nature of his adversary's title where his rights depend upon such ownership by his adversary, as the title is particularly within the knowledge of the adversary. Where a person claims an exemption or right by reason of his authority, as in justifying the taking of goods by a sheriff on execution, he must allege the facts showing such authority, as required by Rule VII. This authority need only be alleged in such general terms as to show that the authority existed, and that the pleader was within the bounds of such authority in doing the acts complained of.

86. **Certainty in all allegations required.**—Rule VIII, "Whatever is alleged in a pleading must be alleged with certainty," is but a reinforcement and supplement to all the foregoing rules. An issue in court should be definite and certain and the opposite

party should be informed of the intent of the matter alleged. The rule is somewhat relaxed where it would require too great prolixity, but the inclination of the courts is to require a party to state positively and accurately every matter essential as a foundation of the cause of action or defense. The safe rule is to become fully informed upon the legal essentials of the action or defense, and the particular facts of that case which may be truthfully alleged, and then to make the allegations sufficiently certain to be good in law, and not so strong in the statement of particulars as to result in a failure of proof on the evidence that can be produced. The decisions are not at all uniform as to the results which follow a failure of proof where the evidence does not conform to the allegations of the pleading by reason of those allegations being too minute, and the student should look to the decisions of his own state on the subject and carefully avoid transgressing the rule as there declared.

87. **Obscurity and confusion to be avoided.**—The nine rules following are to prevent obscurity and confusion in the pleadings and the issues formed thereon, and should be kept in mind by the student. Except Rule 6, they apply (with some modifications) to pleadings under the codes, as well as at common law.

Rule 1. "Pleadings should not be insensible nor repugnant." Rule 2. "Pleadings must not be ambiguous, or doubtful in meaning, and when two different meanings present themselves, that construction shall be adopted which is most unfavorable

to the party pleading it." Rule 3. "Pleadings must not be argumentative." Rule 4. "Pleadings should not be in the alternative." Rule 5. "Pleadings must not be by way of recital, but must be positive in their form." Rule 6. "Things are to be pleaded according to their legal effect or operation" (the foregoing rule applies to common law pleading, while the codes, following the rules of equity pleading, require the real ultimate facts of the case to be pleaded, and not the legal effect). Rule 7. "Pleadings should observe the known and ancient forms of expression, as contained in approved precedents." Rule 8. "Pleadings should have their proper formal commencements and conclusions." Rule 9. "Pleading which is bad in part is bad altogether."

88. **Direct, clear, and unambiguous averments required.**—Most of the foregoing rules are so clearly stated and the reasons for them are so obvious that they require no explanation. The first rule (§ 87) requires the pleader to state the facts in such manner that they may be clearly understood, and to avoid the omission of words or expressions necessary to the sense; to keep clear the main idea, and not to state, in one part of the pleading, matter in opposition to what is stated in another part. This rule also requires the pleader to keep in mind the matter alleged in former pleadings of the same series, and not to allege matter repugnant to his former pleadings in that action in attempting to overcome matter alleged by the opposing party. Thus, the plaintiff must not in his reply allege facts inconsistent with what was

averred in his complaint. A pleading may be introduced in evidence by the opposing party as an admission of facts by the party pleading it, and the rule only attempts to require that the pleadings should be intelligible and the statements honest. The second rule (§ 87) requires such a statement of all facts that the meaning will not be uncertain. If the pleader violates this rule and the pleading admits of two constructions, one in favor of the pleader and one in favor of the opposite party, the court will construe it as against the person pleading it, taking the construction in favor of the opposite party. The court does this on the ground that the party pleading a fact will state it as strongly as the facts will permit. This rule is not applied where it is apparent from the whole pleading that a construction favorable to the pleader was intended, but only where the construction is left in doubt. The third rule (§ 87) requires a pleader to state the matters on which he relies as constituting his cause of action or defense, and not other facts from which he would draw inferences in support of the right he asserts. He is not allowed to state other facts than those furnishing the grounds of his defense or action, and then to argue from the facts thus stated that the action or defense existed, but must allege the ultimate facts on which he depends; and if any inferences are drawn they must be drawn from the evidence to support direct allegations of the facts which are thus inferred.

89. **Direct and positive allegations required.**—The fourth rule (§ 87) requires a pleader to allege his grounds of action or defense in a positive man-

ner, and not in the alternative. He cannot allege that one fact "or" another fact is true, but must allege one of the two facts as the true fact. If he wishes to allege both facts in such manner that he will be entitled to the benefit of either that is proved, and they are not repugnant to each other, he should allege the existence of both; that one fact "and" another fact, not one "or" the other, are true.

The fifth rule (§ 87) is one of the most important rules of pleading, and is one that is more often violated than any other. Many pleaders will allege that certain facts "being" true, certain other things were done. If the recital is merely as an inducement to other allegations, and not really an element of the action or defense, it is not a violation of good pleading to state it in this manner. But if the fact so recited is one of the essential elements of the cause of action or defense, such a statement is not good pleading. Many cases have been lost because this form of reciting the existence of a fact was adopted instead of directly alleging that the fact existed. Thus a plaintiff will allege that, he "being" the owner of certain land, the defendant committed a certain trespass, instead of alleging his ownership in positive language. The old common law form of averment was that defendant "entered the close of said plaintiff," or otherwise alleged the ownership as a fact. A recital of the existence of a condition will not be held sufficient. It should be directly averred that plaintiff owned the land, as preliminary to the further averment that defendant entered upon it and committed the trespass complained of. What-

ever the pleader alleges should be alleged in positive and direct terms, and not merely recited as if the fact of its existence had been admitted.[33]

90. **Forms of pleadings and of alleging facts relied on.**—The sixth rule (§ 87) is applicable to common law pleadings, where the legal effect of an instrument of writing or fact is required to be pleaded. Even at common law there is an exception to the rule that the legal effect should be pleaded, i. e., in pleading an action of libel or slander. In libel and slander the precise words uttered or published are the gist of the offense, although where spoken words are not slanderous per se, the pleader is required to plead matter of inducement, called the innuendo, stating the circumstances and conditions under which they were used, to show that they were intended to be slanderous, and were so understood by the persons hearing them. But in every case of slander and libel, even at common law, the precise words must always be set out. Under the codes, in all cases, the ultimate facts should be pleaded, and not their legal effect. Also the codes require that instruments shall be recited in or filed with pleadings based thereon. The codes do not require that the evidence to support the facts relied on shall be stated, but they do command that the ultimate facts provable by the evidence shall be alleged, and not the evidence nor the conclusions under the law from the facts proved. Thus, while the common law form would be an allegation that defendant is indebted for the price of a horse (a conclusion), the proper

[33] § 86.

form under the code would be that the defendant bought a horse for a price stated, and failed to pay (stating the facts). The seventh rule (§ 87) requires that every lawyer pleading under the common law shall observe, above all things, that the ancient expressions must be accurately followed, where applicable. These ancient expressions hold a legal meaning far greater than their grammatical meaning, and the lawyer who attempts the substitution of a new for a proper expression merely shows his lack of learning. Even when pleading under the code the wise lawyer will not attempt to invent an expression where he may easily employ an expression of established and unquestioned sufficiency. All capable lawyers, under any rules of pleading, will follow beaten paths in the forms of expression where they are available and suitable. The eighth rule (§ 87) merely requires the use of known and sufficient expressions in the commencement and conclusion of pleadings, which all capable lawyers will follow in common law pleading, while they will at least take them as a suggestion in the preparation of pleadings under the code.

The ninth and last rule of pleading (§ 87) states in a terse way a well-known fact, that nothing is stronger than its weakest part, that a chain is no stronger than its weakest link, nor a pleading stronger than its weakest part. It results, as a matter of course, that a pleading bad in part is insufficient, the defective part destroying one of the elements necessary to the strength of the pleading.[34]

[34] § 86.

91. **Demand for relief and conclusion.**—Another rule to be observed by all good practitioners is that "The declaration should, in conclusion, lay damages, and allege production of suit." That is, having stated the amount of damages. the declaration states "And therefore he brings suit." Where an action is to recover damages, the plaintiff should allege that the wrong resulted in damage and allege a sum of money as the amount of damage caused by the wrong. This sum should be equal to or more than the amount which the plaintiff hopes to recover. The pleading should close with a demand for the relief desired by the plaintiff, which in an action at law for damages is a judgment for a sum of money. An action for damages would be without force in the absence of an allegation and proof of the damages sustained. The plaintiff must remember that he cannot recover more damages than are alleged, and the only limit upon the amount to be alleged is the jurisdiction of the court and any possible prejudice to be roused in the minds of the jury by asking too much. The question of the amount which will be alleged as the damages suffered is a matter of judgment and sound discretion, which cannot be laid down in any book; but a person of good judgment will easily adjust his demand to the facts of the case. At common law the declaration closed with the words, "And therefore he brings this suit," and as this was a part of the approved form, it was necessary to make the allegation. In most of the forms of pleadings under the code there is no such allegation, though it would not be improper to insert it in any

declaration or complaint. The proper conclusion of a plea or replication is treated of in another chapter.[35]

92. **Profert of sealed instruments—Reciting contents of writing.**—Another rule which should be kept in mind in pleading an instrument under seal at common law, is that "In all pleadings where a deed is alleged, under which the party claims or justifies, profert of such deed must be made." That is, if a person suing or defending at common law claimed that there was a written instrument under seal giving him the right or the exemption claimed, he was compelled to make an offer to the other party of an inspection of it, who might then read it and more fully know the nature of the claim which the pleader set up. This rule at common law only applied to writings under seal, where the action or defense was based upon the instrument, and did not apply to parol writings, nor to writings under seal where they were but incidentally evidence of the facts and not the foundation of the action or defense. Under the various codes, and in some states using practice acts which merely modify the common law, a written instrument, sealed or unsealed, or a copy thereof, must be recited in or filed with the pleading where a party founds his action or defense upon it. In case an action is founded upon a written instrument the codes and practice acts generally provide that the writing or a copy of it may be filed as an exhibit, and made a part of the pleading in that way. Where the party bases his right upon an instrument of writing, but it is not the foundation of his action or defense,

[35] §§ 114-119, 128.

The statutes ordinarily do not permit the instrument to be made a part of the pleading as an exhibit. Thus, if one party to a written contract should assign his rights under the contract, and the assignee should bring suit thereon as such assignee, the assignment in some states would not be made a part of the pleading by the filing of a copy of it as an exhibit. The advantage of making a copy of the writing an exhibit instead of copying it into the complaint is most apparent where the party wishes to file several paragraphs of his pleading and to depend upon one copy of the writing serving for all of the paragraphs, or where the instrument is very long. He then files it as an exhibit and refers to it in each paragraph, thus making the paragraphs much shorter, and often more intelligible.

93. **Pleading facts established by written contracts.**—It is held that setting out the instrument verbatim (word for word) is not a proper form of pleading, where the pleader fails also to allege its legal effect (under the common law), or the ultimate facts which it establishes (under some codes). At common law the plaintiff pleads the deed according to its legal effect, and where the defendant does not believe that the deed is properly pleaded as to its effect, he may demand oyer (inspection), that is, he can compel the plaintiff to set it out at length in its own language, and then the defendant may demur to the declaration as not being supported by the deed. Where the party relies upon several writings as forming one contract, they should all be connected in the pleading by proper averments showing that they

are all relied upon as one contract. The date of the instrument and the names of the persons named therein are essential parts of it, and should be correctly alleged. Where there are statutory requirements as to the execution, form, or other elements of the writing, the pleading should show that they were fully complied with. In short, whatever is pleaded should be so pleaded as to show that it is sufficient to establish a cause of action or of defense on behalf of the person pleading it.

94. **Title of the pleadings.**—All of the pleadings should be properly entitled, showing the venue, by giving the names of the state and county, and if the action is before a township or city court, the name of the township or city also. The title should also show the name and designation of the court, and the names of the parties. In most of the states the first pleading is the only pleading in which the names of all the parties must be set out in the title; while the title of any subsequent pleading is sufficient if it contains the names of the political divisions defining the venue of the court, and of the first named of the plaintiffs (in case there are two or more), followed by the abbreviation "v." and then by the name of the first mentioned defendant, each name being followed by the words "et al." ("and others"). Where the student is entirely unacquainted with the forms of pleadings used in his state he should go to the court house at the county seat and examine a sufficient number of pleadings of the different kinds to gain a concrete idea of their form and contents, as actually used. The reading of a few pleadings in

cases with which he is acquainted or about which he has heard, will, as was suggested above, give him a better comprehension of this subject than can possibly be given from an abstract study of the subject alone.

95. **Allegations must embrace all facts to be proved.**—The plaintiff's attorney, in preparing his declaration or complaint, especially under the codes, must be careful to allege facts in support of which all the evidence supporting his cause of action may be admitted. Under the common law the language of the form used in declaring upon the kind of action brought may have such a legal meaning, acquired by use, that while it may not (as some student believes) fully cover the evidence, if interpreted according to its grammatical construction, yet it will admit all proof in support of that particular action, however faulty the grammatical construction of the language as covering such evidence. The student must remember that the defendant is entitled to be fully informed of the grounds of the action, and the plaintiff must either state in his declaration facts from which those grounds appear, or plead some form which gives legal information to the defendant of those grounds. This does not mean that the pleader under the code must allege any information in regard to who will testify as witnesses, or what will be their testimony, or as to any other element of evidence which will be used to support the action. What it does mean is that the allegations shall be broad enough that the evidence to be offered at the trial will tend to support them. The student is re-

ferred to any good work on forms in use in his state to gain a better comprehension of the character of allegations usually employed in stating different kinds of actions. Where no general averment in the form which he is following covers the particular facts contemplated by the student, he should so modify the statement of facts suggested by the form as to make the allegations cover the facts which can be proved in his case, for each action depends upon its own peculiar facts. All forms given for use in code states are merely suggestive of the allegations of facts sufficient to cover each element of an action of the kind to which it relates. The student should remember that reading actual pleadings drawn by capable lawyers in cases with which the student is acquainted, will greatly assist in gaining an understanding of this subject.

96. **Verification of pleadings—Signing.**—In some states all pleadings must be verified by oath. That is, some person must swear that the allegations of each pleading are true. In other states only certain matters need be sworn to, as where the plaintiff demands a writ of replevin or a writ of attachment, or is asking for a restraining order or some other extraordinary relief. In the equity practice the pleadings were required to be verified, and this practice under the codes, so far as it is followed, was adopted from the courts of equity. At common law, pleadings were not sworn to. Those states requiring an oath to verify all pleadings do so to prevent false and fictitious pleadings and issues. The advantage and disadvantage of the verification by oath of all

pleadings, being an open question, will not be considered here. Each attorney must obey the law of his own state in this regard. Where an oath is required the pleading will be insufficient if it is not verified, and may be rejected or struck out on motion, though in many states the failure of the opposing party to raise the question is ordinarily held to waive it. Where an oath is required to give the court jurisdiction of the action, as where the plaintiff is required to make an affidavit of residence and the length of residence upon filing an action for divorce, as the laws of most states require, it is generally held that the court can acquire no jurisdiction of the action unless the affidavit is filed. Where it is held that the affidavit goes to the jurisdiction of the court, the failure to raise the question in proper time and in the proper manner will not be a waiver of the defect, but it may be raised at any later stage of the proceedings. This is because the state itself has an interest in those actions, and the parties cannot waive the interest and rights of the state: and as the court could not acquire jurisdiction for lack of the proper affidavit, there never was any proceeding before the court whereby the opposite party could waive his rights to raise the question. The plaintiff's first pleading and all other pleadings in the cause must be signed, either by the party or his attorney. An unsigned pleading is defective as being without authority from anyone.

97. **Filing the declaration, praecipe and process.**—The plaintiff's attorney, having fully inquired and learned all of the facts material to the action, and

having fully investigated the law applying to those facts, and determined who are the proper parties to be made plaintiffs and defendants, and thereafter having drawn his first pleading, alleging in positive and certain language each element of his action, with allegations comprehensive enough to enable him to introduce each matter of evidence necessary to support his action, must then file his pleading. This is done by taking it to the clerk of the court and requesting him to file it. In some jurisdictions, if the court is in session the practice is to file it in open court; while in others the practice is to file it in the office of the clerk, whether court is in session or not. An inquiry of the clerk will give information of the practice in each jurisdiction. A pleading is filed in open court by taking it into court and causing a memorandum to be made by the judge and clerk that it has been filed, and delivering it to the clerk as part of the court papers. In some jurisdictions a written praecipe (order) requesting the clerk to issue a summons for service upon the defendants must also be filed, while in others this is only required in case the court is in session and a return day earlier than the first day of the next term of court is desired. No written praecipe was required at common law, but writs of summons were returnable the first day of the following term. The written praecipe is short and simple, one form being that "the clerk will issue summons to the within named defendants, returnable the ——— day of ———" (signed by the attorney). Other forms in other states are more specific, but the praecipe is for the

information of the clerk, and what is sufficient to give him the necessary information is ordinarily held sufficient.

98. **Same subject.**—As has been shown in a former chapter, the plaintiff, in some jurisdictions, may serve notice of an intention to file a declaration against a defendant and set the law in motion, before he has prepared his declaration alleging his cause of action. Where this rule applies it merely serves to require that the defendant shall appear in court within a shorter time after the filing of the declaration, and does not excuse the plaintiff from afterward filing a pleading fully stating what rights he seeks to assert and how they have been violated. The time of bringing the action merely dates from the service of notice on the defendant in such a case, instead of dating from the time when the plaintiff files his first pleading. The declaration must be filed and the defendant properly commanded to appear before the plaintiff can require any positive acts to be done affecting the defendant or what he is enjoying, except in those actions, such as replevin, attachment, and other proceedings, where an affidavit is filed of facts showing a necessity for immediate action, and other proceedings where a bond is taken to insure the payment of damages if the order thus obtained violates the defendant's rights. In cases of that kind statements of facts showing the plaintiff's right, supported by oath, are required, together with a bond to reimburse the defendant for loss, and on compliance with these requirements the defendant's possession or other enjoyment is invaded be-

fore he has been given notice and afforded an opportunity to appear and defend the action. But except in such extraordinary cases, judgment can only be given after notice and after a declaration has been filed, and the court does nothing toward giving the plaintiff relief until after judgment, for each person is entitled to his day in court, with full information regarding the nature of the charge against him or the defense interposed, and the courts ordinarily will not take action affecting the rights of any defendant without affording him an opportunity to defend them. Notice is essential to "due process of law;" and while constructive notice to a party, as by seizing property in his possession or in which he claims an interest, and publishing a notice commanding him to appear, is lawful when it is impracticable to serve a personal notice, that form of notice is confined to cases of apparent necessity for its use.

CHAPTER VIII.

THE DEFENSES TO AN ACTION AND THE DEFENDANT'S PLEADINGS AND RULES GOVERNING THEM.

99. **Preliminary investigation by attorney for defendant.**—Where a defendant served with process calls upon a lawyer to defend him, the lawyer will examine the return of the officer serving the process to determine whether or not his client has been properly summoned. He will also inquire of his client to ascertain if he lives within the jurisdiction of the court. He will then obtain from his client a full statement of the facts bearing on the action, including those which are unfavorable to the client, and those tending to support any defenses to the action which the client thinks may be offered. Having these facts well in mind, he will consider: (1) Whether or not the court has jurisdiction over the subject of the action and his client (if properly served with process); (2) whether or not his client has been sufficiently served with process to compel him to defend the case in that court; (3) what defense he may make to the action as brought. If for any reason he believes the court has no jurisdiction of his client, as when the client may lawfully insist on being sued in another county, or has not been properly served with process, he should not enter a general appearance to the action, but appear specially to present his objections on these grounds. If he enters a gen-

eral appearance such appearance will waive these matters, since the defendant may waive notice and enter an appearance without it, and may submit his controversies to a court other than that of the county or political subdivision in which he lives. If the court has no jurisdiction of the subject matter, as when the action is for divorce in a court having no jurisdiction of divorces, he cannot waive the defect, as he cannot, by waiver, make a court out of what is not a court. He may question the jurisdiction of the court over the subject matter after entering a general appearance.

100. **Choice, as between dilatory pleas.**—If any sufficient cause exists for a dilatory plea to the action, the attorney representing the defendant should enter only a special appearance. Dilatory pleas, as we have seen, are: (1) Pleas to the jurisdiction of the court; (2) pleas in suspension of the action; and (3) pleas in abatement of the action.[36] We also learned that these pleas should be used in the order named, as the defendant could not question the court's jurisdiction over his person after having asked it to pass upon either the suspension or abatement of the action, though if the court has no authority to try an action of that character, the defendant may raise that question at any time. The defendant will wish to file a dilatory plea, when he feels that he will have a greater opportunity to defeat another action brought in a different court or under different conditions, or thinks the postponement of the trial by its abatement will be to his advantage.

[36] § 25.

The defendant usually prefers to defend an action at his own home within his own county or township. Some courts hold that a judgment by default against a resident of the state who is a resident of another county may be set aside on motion, and the action abated, while others hold that the defendant sued in the wrong jurisdiction must raise the question in the first instance. But the student will learn of these matters in the study of other subjects, and we shall only consider what is necessary to make pleas in abatement sufficient.

If the defendant cannot deny the jurisdiction of the court but there is some reason why the plaintiff has no right to prosecute the action at that particular time, as when the plaintiff is a citizen of a country with which his country is at war, defendant should file a verified plea setting up the fact, and ask the abatement of the cause until conditions permit the action to be prosecuted.

101. **Use of pleas in abatement.**—Pleas (or answers) in abatement relate either to the person of the plaintiff, to the person of the defendant, to the pleading filed, to the service of the summons, or to some other fact not appearing upon the face of the pleading, but which deprives the plaintiff of all right to maintain that particular action at that time, and under the conditions under which the action is being prosecuted. Pleas in abatement are used where there is another action pending in another court between the same parties involving the same matters, where there is a failure to join all of the persons necessary for the full determination of the suit be-

fore the court as parties to the suit, or when any of the other numerous conditions exist which show that the plaintiff cannot maintain his action in that court under the particular conditions then existing. None of the dilatory pleas present any question on the merits of the action, but only the question whether suit has been brought in the wrong place or the wrong court, or at the wrong time, or in the wrong manner, or whether there is some other obstacle to a finding and decision concerning the rights of the parties. An attempt by the defendant to gain a decision regarding the merits of the action by setting up a meritorious defense or denying the facts alleged by the plaintiff as constituting his action, waives his right to abate the action on account of facts for which it might be subject to abatement. A defendant cannot both deny the court's power to determine the plaintiff's right, and at the same time demand a hearing upon his own defenses to the action. Such an attempt merely overcomes the defendant's matter in abatement, and amounts to a submission to the jurisdiction of the court over the defendant's matter in abatement and the cause, in case the court is one which has jurisdiction to try that class of actions.

102. **Dilatory pleas must not embrace matters of defense.**—The defendant is not permitted to include matters of defense in a dilatory plea, nor to file a plea to the merits with such a plea, nor to file a dilatory plea after submitting a defense on the merits. Dilatory pleas are not favored by the law, and great particularity is required in pleading them. This rule applies with especial strictness in construing pleas

in abatement, and in pleas of this kind all presumptions are against them, so that a party attempting to set up a plea in abatement must not only directly allege all of the facts on which he relies, but must also negative any matter tending to avoid the effect of the pleas which would naturally suggest itself to the mind. Where a dilatory plea is sustained, the judgment is merely that the suit shall abate, and the court in no way decides the merits of the controversy.

If a dilatory plea is overruled the only judgment is that the defendant must plead over and pay the costs, which in some jurisdictions includes all costs of the action down to the time of the decision. In no instance does a decision on a dilatory plea decide as to the merits of the action.

103. **Demurrer to the declaration.**—If the defendant has no ground for a dilatory plea, or if he considers it best to waive the matters in abatement, or if his plea is overruled, he is then called upon to defend the action on its merits. He still has available as means of defense: (1) demurrers; (2) motions; and (3) pleas (answers) to the merits of the action. We will first consider the nature and effect of the demurrer. Where the defendant upon examination of the plaintiff's declaration (complaint) believes the plaintiff has not stated a cause of action, he can call for a decision of the court on its sufficiency by filing a demurrer to it. A demurrer is a written allegation in technical language, the legal meaning of which is that admitting the statements of the pleading to be true as presented and relied on

by the pleader, he has yet shown no cause why the party demurring is liable to an action or subject to a defense (as the case may be) under the facts pleaded.

104. **Judgment on demurrer.**—Under the early English common law, where the parties submitted a demurrer for the decision of the court the decision on the demurrer disposed of the case, and final judgment was given in favor of the party in whose favor the issue on the demurrer was decided. Under this early rule if the party pleading wished to amend his pleading he was compelled to ask for and obtain permission of the court to amend it before the demurrer was ruled upon. The party filing a demurrer took the risk of his legal judgment in calling upon the court for a decision as to the sufficiency of the pleading, since a decision upholding its sufficiency was a decision of the cause against him. Under modern practice the judgment on demurrer is that the defeated party plead over and amend, and final judgment is not rendered upon a ruling on demurrer unless the defeated party refuses to plead further. That is, unless the party whose pleading was held insufficient declines to amend it, or the party whose demurrer was held not to be well taken refuses to file a pleading denying or avoiding the cause of action or defense set up in the pleading which he has unsuccessfully demurred to.

105. **Forms of demurrers.**—The common law system of demurring, including the old practice as to the use of special demurrers, has been wholly or partly abolished by statute in all jurisdictions, and the reasons for which a demurrer may be filed are

now prescribed by statute in all of the states and in England.[37] Demurrers are available only where some defect appears on the face of the pleading. They are addressed to the sufficiency of the statement of facts, or to a misjoinder of causes of action, or a defect of parties, or are based upon such other grounds as may be named in the statute. Demurrers are also divided into two general classes: General demurrers and special demurrers. The old common law general demurrer to the declaration for want of facts, after setting out the proper title of the pleading, stated: "And the said defendant by ———— his attorney (or in his own proper person) says the declaration is not sufficient in law." The most common form of demurrer to a declaration or complaint, under the codes, sets out the proper title of the cause, and says that "The defendant demurs to the plaintiff's complaint for the reason that the said complaint does not state facts sufficient to constitute a cause of action." Special demurrers point out particularly alleged defects in the pleading, and show what element of a cause of action is lacking in the facts stated. Some states use the general demurrer, while in others none but a special demurrer for a specific cause is allowed. The statute of each state should be consulted as to the form and effect of the demurrer. Forms of demurring to a plea (answer) for failing to present a cause of defense, or to a replication for failure to avoid the defense pleaded, depend on the codes and practice

[37] Brown v. Duchesne, 2 Curtis 97 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

acts of the several jurisdictions, to which the student is referred.

106. **Challenging insufficient and indefinite pleadings.**—In those states where the general demurrer is allowed, and defects in the declaration (complaint) are not waived by pleading to the merits, it is ordinarily good practice to test the pleading by demurrer and to save an exception to the ruling, if the court decides against the demurrer. An available exception for use in reversing the judgment by an appeal is thus saved, if the declaration is insufficient, while no rights are waived or lost by demurring if the declaration is not really defective. Where the special or specific demurrer only is allowable demurrers are less common. If the declaration is insufficient and its defects are pointed out by a demurrer the plaintiff's attorney is apt to amend, and having his attention thus called to an essential fact in his case is more likely to prove his case at the trial than if no demurrer had been filed. In many cases a special demurrer thus serves only to educate the opposite party and to point out to him what is required to win his suit. A demurrer only questions the pleading for defects which appear from reading the pleading itself. Where the matter by which the pleading should be overcome does not appear on its face, such defense must be presented by a pleading setting it up as new matter to overcome the other party's pleading. That a pleading merely states the facts in a general way, though without sufficient particularity, does not make it subject to demurrer. Provisions are made by statutes to compel an indefinite

pleading to be made more definite, which in most states is accomplished by a motion to make more specific.

107. **Ruling of court upon a demurrer.**—Demurrers may be filed to any later pleading than the plaintiff's declaration or complaint where such subsequent pleading fails to meet fully the pleading it is intended to answer. The same questions as to whether it is wise to file a demurrer or is better not to file one, and the same reasons by which to answer these questions, apply in case of the later pleading which apply in presenting a defense to the first pleading. Where a demurrer is filed to a plea (answer) or replication, or other pleading subsequent to the plaintiff's declaration or complaint, the demurrer questions every pleading of the series theretofore filed; so that if the plaintiff files a declaration and the defendant sets up his defense by a plea of new matter, to which the plaintiff demurs, the demurrer questions the sufficiency of the declaration as well as the sufficiency of the plea. If the declaration is insufficient the ruling of the court may be in favor of the defendant, no matter how defective the plea may be in presenting a defense to a good cause of action. A poor plea is a sufficient defense to a bad declaration, for the poor declaration requires no answer.[38] The plaintiff has no reason to complain in such a case whether the ruling of the court carries the demurrer back to the declaration and holds it defective, or overrules the demurrer to the plea, hold-

[38] Clearwater v. Meredith, 1 Wall. 25 (U. S.), LEADING ILLUSTRATIVE CASES.

ing it sufficient, since each has the same force as constituting a ruling against plaintiff. The ruling against either party, either on sustaining or overruling a demurrer, under the practice in most jurisdictions, is that he plead over, unless he elects to stand on the alleged sufficiency or insufficiency of the pleading.

108. **Motions attacking defects in pleadings.**—At common law, where the declaration was not sufficient in form, that was a cause for demurrer. There being no required forms under the codes, such demurrers cannot be used; and by statute in most or all jurisdictions adhering to the common law system of pleading, defects in form are now reached by motion. In the code states if a pleading alleges sufficient facts to constitute a cause of action or defense, but alleges them in such general language that they do not sufficiently inform the opposite party of the nature of the matter pleaded, he may file a motion to require the pleader to make the pleading more specific. Sometimes the pleading is such that he might enforce a motion of this kind, but the light which it would give the opposite party as to the conduct of his side of the action would be greater than the information and advantage to be gained by insisting on the motion. In such cases a wise lawyer will not file it, but will resort to some other means of informing himself about the facts of the case. Where the pleading is so general that it gives the party filing it too great latitude in the introduction of evidence, or fails to give sufficient information of the precise nature of the facts, the opposite party has the right

o require that it be made more specific, and will ordiarily compel this to be done unless there is some ood reason for ignoring the defect.

109. **Plea or answer—Common law rules.**—The efendant having appeared and either waived his ight to present dilatory pleas, demurrers and moions, or, after presenting them and obtaining rulngs thereon, is then ruled to answer, his next efense will be a plea to the merits of the action. leas to the merits are of two kinds: (1) pleas by ay of traverse (denial); and (2) pleas in confesion and avoidance. Before we take up these pleas answers, or affidavits of defense as they are someimes called) we will consider some of the rules govrning the plea at common law, many of which must pply under any form or system of pleading, as folows: Rule I. "Dilatory pleas must be pleaded at a reliminary stage of the suit." Rule II. "Pleas nust be pleaded in due order." Rule III. "Pleas n abatement must give the plaintiff a better writ r declaration." Rule IV. "After the declaration, he parties must at each stage demur, or plead by ay of traverse, or by way of confession and avoidnce." Rule V. "Upon a traverse, issue must be endered." Rule VI. "Issue when tendered must be ccepted." Rule VII. "There must be no departure n pleading." Rule VIII. "Where a plea amounts o the general issue, it should be so pleaded." Rule X. "Surplusage is to be avoided." Rule X. "All ffirmative pleadings which do not conclude to the ountry must conclude with a verification."

We will take up these rules by number, as the stu-

dent should commit them to memory, keep them all in mind, and not require their repetition for a full understanding of them. The first three rules might properly belong with the consideration of dilatory pleas, and the fourth might have been considered with the subject of demurrers, but they are here considered together, better to group them in the student's mind.

110. **Presentation of dilatory pleas.**—We have seen that if the defendant wishes to raise any question by a dilatory plea he should ordinarily file such plea even before he enters his general appearance.[39] It makes no difference whether the defendant has been properly summoned or not, or whether he lives within the jurisdiction of the court, or whether there is any other objection that might be raised to compel him to submit to the court, if he has already submitted to it. Entering a full appearance without objection is a submission to the jurisdiction. Likewise he must set forth any matter in abatement regarding the parties or the right of the plaintiff to prosecute the action on which he relies before he attempts in any way to gain for himself a hearing on the merits of the case. Everything in the action should proceed in order, and a party waiving a right or plea by proceeding to the next step in the action cannot ask for a hearing upon the matter waived. He cannot ask for the hearing of a matter rightly belonging in the latter part of the action, and after an unfavorable decision, turn the action back to a preliminary stage to try a question he has waived.

[39] §§ 99, 100.

he foregoing statement explains the reason for the rst two rules recited in the preceding section. The ird rule (§ 109) is to prevent the presentation of a latory plea unless it is really true that the plain- ff's proper remedy is in some other court or place, at some other time, or under some different cir- mstances. He must have a remedy if he has suf- red a wrong, and his action will only be abated in se it appears that there is some other way open r him to proceed which ought to be followed. This le requires the defendant to point out some way by hich the method of proceeding can be improved. he claims he is sued under the wrong name he ust state his true name. If he insists on a defect parties he must point out who are the proper par- es and show that they can be brought before the ourt. And if he pleads that he has been sued in e wrong county he must name the place where suit uld lawfully be commenced. Whatever the defect leged he must show how it may be remedied.

111. **Pleadings must tend toward an issue on the erits.**—After the preliminary stage, during which e defendant has the right to file dilatory pleas, ch party must so frame his pleadings as to proceed ward a hearing of the action on its merits.[40] Un- r the common law, the only pleadings on the merits rmitted to be filed were demurrers, and pleas either denial or by alleging new matter to avoid the legations of the opposing party. Under the later ractice acts and codes, the parties may also make se of motions, but the statutory motion does a serv-

[40] § 109, ante.

ice performed by the special demurrer under the common law.[41] Under the common law the sufficiency of pleadings largely depended on following established forms, and defects in the statement of a cause of action or defense in matters of form were reached by demurrer, as well as defects in matters of substance. The abuse of the practice of demurring specially for defects of form has led to an almost universal substitution of the use of motions to challenge the form of pleadings. There being no forms recognized under the codes, a complaint which imperfectly alleges sufficient facts, by reason that the necessary facts are alleged too generally, or which otherwise fails properly and sufficiently to inform the opposing party, must be corrected by a motion to make more specific. A pleading which omits some essential element required to give the court jurisdiction, such as verification, if the pleading is one which the law does not permit to be entertained by the court without verification, or the signature of the party or his attorney to show the authority by which the pleading was filed, should be challenged by a motion to strike it out. Also if matter which does not properly belong in a pleading is erroneously inserted, the improper matter may be struck out on motion. The subject of demurrers has been considered in former sections,[42] and only pleas of denial and pleas setting up new matter will be discussed here.

112. **General and special traverse.**—Where the opposing party's pleading is clearly sufficient to withstand all motions and demurrers, or where the

[41] § 108.

[42] §§ 103-107.

-ht to file them has been unsuccessfully exercised is waived, a party must plead to the facts stated his adversary's pleading, as contemplated by Rule (§ 109).[43] This pleading may be either a denial of ts alleged by his adversary or the allegation of new tter to overcome those facts. The most frequent a by a defendant at common law is the common verse (denial) by which all or a material part the allegations of the declaration are denied. And der the codes the plea (answer) most frequently d is the denial, either general as to all allegations the declaration (complaint) or special as to one more of its material allegations. The technical me of "special traverse"[44] was given to a form pleading at common law by which facts inconsistt with some material part of the declaration were eged in affirmative form, closing with a clause bsque hoc" (without this), specifically denying e allegation of the declaration contradicted by the ecial averments of the plea.[45] This form of plea now seldom used. But the common traverse at mmon law is of two kinds: (1) The general issue, which the cause of action alleged in the declaran is denied in general terms, and (2) such pleas the general issue as deny only one or more mateal facts, such as "non est factum" (is not his deed), il debet" (never indebted), "not guilty," or "non pit" (did not take).[46] And in like manner, pleas

[43] Stephen, Pleading (4th Am. ed.) * pp. 165-182.
[44] State ex rel. Barrell et al. v. Christman et al., 2 Ind. 126, LEADING LUSTRATIVE CASES.
[45] § 119.
[46] Stephen, Pleading (4th Am. ed.) * pp. 153-163.

of denial under the codes include pleas of general denial and pleas of special denial, the first denying all that is alleged in the declaration, and the other denying specially some one or more of its allegations.

113. **Same subject—General and special denial.** —In this country, in the code states and under some of the practice acts, a party may deny such allegations as he wishes to deny, and allege new matter, which, together with the partial denial, will constitute a defense.[47] At common law the denial of matters in a pleading was called a traverse, while under the codes it is called a denial. This denial (traverse) may be either general or special. The general denial goes to the whole of the action or defense alleged by the opposing pleader, while the special denial goes to some essential element or allegation of his pleading. Those code states requiring pleadings under oath contemplate only the denial of those matters as to which there is a good faith dispute. In states where the general denial is in common use, special denials are but little used unless also accompanied by a paragraph of general denial. The proper use of the general and special denial, and the pleading of new matter, present both legal and psychological questions. Where a plea of special denial will set out and emphasize the evidence to be offered at the trial in a manner to create a stronger impression of the facts favorable to the pleader on the minds of the jury or of the judges sitting as triers of the facts, it is well to use it, even though the same proof could be made under a general plea.

[47] § 109.

114. **Plea of general denial.**—One who uses a plea of special denial (traverse) should take care that it denies such essential elements of the other party's pleading as will defeat that pleading. Thus, in trespass or trover a special denial may dispute plaintiff's possession. In each case it must deny the essential element of the cause of action, defense, or replication it is designed to meet. Where the general denial (traverse) is fully allowed the special denial is frequently used, in cases where it may give an appearance of candor and fairness and thus create a favorable impression on the jury. A general denial is the proper defense where the defendant intends to deny, in whole or in large part, that the plaintiff's cause of action ever existed. At common law the common traverse or plea of the general issue denies, by a general form of expression, the matter alleged in the adverse party's pleading, instead of denying the particular facts recited "in the manner and form" alleged, as was the form of the special traverse.[48] Under the codes a common form is that the defendant "denies each and every allegation therein contained." The general denial (traverse) usually puts the plaintiff to the proof of his whole action, or the defendant to the proof of the whole defense alleged. Where the defendant files a general traverse to the plaintiff's declaration, it is called pleading the general issue. The general traverse at common law may be pleaded to any action but account rendered, and in some states the general denial may be pleaded in all ac-

[48] State ex rel. Barrell et al. v. Christman et al., 2 Ind. 126, LEADING ILLUSTRATIVE CASES.

tions. Under the common law the general traverse in each case has its own peculiarities, which will be considered hereafter. Where it is allowed under the codes, the general denial reaches every element of the plaintiff's action as alleged unless limited by other provisions of the code. One of the limitations on the use of the plea of general denial under the codes is in actions on written instruments. The codes usually provide that the execution of a written instrument on which suit is brought can only be denied by a pleading under oath, commonly called non est factum (not his deed). Where this rule prevails a pleading denying every allegation of the declaration (complaint), if not sworn to, simply denies the existence of the writing, and does not question its execution or truthfulness.

115. **Plea of non assumpsit.**—At common law the general denial in an action of assumpsit is called "non assumpsit" (did not undertake). It consists of a formal denial of the express promise or contract (the undertaking) alleged by the plaintiff. This carries with it a denial of all facts from which the promise might be inferred.[49] That is, it goes to the first element of the action and denies that there ever was a promise, and in no way questions the alleged violation of the contract. It covers any defense which would show that the promise never existed, because no promise was given, or because it was in violation of law, or otherwise absolutely void. Where the action is upon a special contract and not on an implied one, it puts the contract as alleged in issue,

[49] Stephen, Pleading (4th Am. ed.) * pp. 157, 160.

and the defendant may show in defense that the true contract was in fact different from the one alleged. If the defendant wishes to show fraud, or any other matter overcoming the contract, it must be alleged as new matter by way of confession and avoidance. If he wishes to show that he was not guilty of the breach he should plead a special traverse of the breach in the manner and form alleged. In fact, the plea of non assumpsit denies that the obligation ever existed in the first instance, as alleged, and any evidence which will overcome the existence of that obligation will be admitted under the plea.

116. **Pleas of nil debet, non est factum, and nul tiel record.**—Where the action is in debt, and is founded on a simple contract or a right under a statute, the proper general issue under the common law is "nil debet" (never indebted). This is a formal denial of the contract or of the facts from which the debt would be implied by law. Like non assumpsit, it denies the creation of the obligation, but does not deny the breach of it, and generally the same rules apply regarding the pleading of both of these defenses. Where the action is in debt on a writing under seal, the general issue at common law is "non est factum." This plea consists of a formal denial that the deed pleaded in the declaration is the deed of the defendant. But non est factum is a proper plea at common law only when the action is founded on a sealed writing. Where the action is not founded on a deed under seal, but a simple writing, nil debet is the proper defense. Like non assumpsit and nil debet, non est factum only denies the binding force

of the alleged deed and is not a defense to the alleged breach if the sufficiency of the deed is established.[50] Where the action is in covenant the general issue is "non est factum," as in actions in debt upon a sealed writing. It also is a formal denial that the deed is the deed of the defendant, and does not put in issue any other defense. Where an action is on a sealed instrument, the seal estops the defendant at common law from alleging that he did not promise, etc. If the deed is his deed he is bound, and his proper defense is to show that under the circumstances it is not his deed. Where the action is on a judgment, the general issue at common law is "nul tiel record." This plea only denies the existence of the record. It does not in any way raise the question whether or not the record is still binding.[51] In any of these cases, if the defendant wishes to show a release or other defense not covered by the general issue it must be specially pleaded.

117. **Pleas of non detinet, not guilty and non cepit.**—Where the action is in detinue, "non detinet" (does not detain) is the general issue. It is a formal denial of the alleged withholding of the goods. It only goes to the denial of the detention, and in no way denies that they were once in defendant's possession. Nor can the defendant in any way justify the withholding of the goods under this plea; all such defenses must be pleaded specially. Where the action is in trespass, "not guilty" is the general issue. It is a formal denial of the trespass alleged

[50] Stephen, Pleading (4th Am. ed.) * pp. 156, 159.
[51] Stephen, Pleading (4th Am. ed.) * pp. 101, 232.

by the plaintiff. Under this plea defendant may make any proof in denial of the trespass. The possession of the plaintiff being necessary to constitute it a trespass, the plea puts that possession in issue. If the defendant seeks in any way to justify the trespass the justification must be pleaded specially. Where the action is in trover, "not guilty" is also the general issue. It is a formal denial of the conversion of the property. It puts only the conversion in issue, which at common law includes the plaintiff's possessory title; though this rule has generally been modified, so that now the general rule is that the plea puts the conversion alone in issue. In trespass on the case the general issue is also "not guilty." It also puts in issue only the commission of the wrong, and no justification can be proved under it. Where the action is in replevin for a wrongful taking, "non cepit" (did not take) is the general issue. It puts in issue only the taking. Where the action is in replevin for a rightful taking but a wrongful withholding, "non detinet" (does not detain) is the proper plea of the general issue. This plea, like non detinet in the action of detinue, puts in issue only the detention of the goods. These defenses, like the other general issues, deny only the wrongful acts alleged and not the matters alleged by plaintiff to show the conditions surrounding the parties at the time of the wrong. In fact, the rule of the common law in each of these cases is only to allow a defense by denial of the wrongful act under the general issue and in no way to permit the defendant to confess that he committed the wrongs and justify

their commission under the general issue. All of the general traverses ended with a demand for trial in the following words: "And of this he puts himself on the country."[52]

118. **The general issue as a replication.**—Where the defendant at common law alleges matter of excuse in his plea the plaintiff is permitted to reply by a denial in general terms and is not compelled to traverse specially the matter alleged by the defendant. The plaintiff may reply that "the defendant, of his own wrong and without any such cause as in his plea alleged," committed the wrong complained of, and it is a sufficient traverse by way of replication. This plea may be used where the defendant pleads affirmative matter by way of excuse, but where the defendant pleads in justification by alleging facts showing authority for the act complained of, the plaintiff cannot use this form of general replication.

119. **The special traverse.**—Where the defendant at common law wishes to deny any of the matter alleged by way of inducement (that is, alleged to show the conditions under which the acts were committed), and for any reason is estopped to deny generally the plaintiff's right, he is compelled to use a special traverse (denial) of those facts. A special traverse differs from the general traverse in that it does not conclude to the country but concludes with a verification. Instead of demanding a trial with the words, "And of this he puts himself on the country," like a general traverse, it closes with the same words as the declaration, "And this he is ready

[52] Stephen, Pleading (4th Am. ed.) * pp. 156-161.

to verify." The special traverse alleges new facts in its first part, inconsistent with some fact alleged in the declaration, followed by an expression "without this" (absque hoc), after which it alleges the matter in plaintiff's declaration, which is denied by the plea. Where the defense is a denial of any matter of inducement alleged by plaintiff the special traverse is the proper plea. Where the special traverse is in proper form and contradicts an essential element of the cause of action the plaintiff is compelled to join issue upon it. The special traverse has been most often used where a landlord sued a tenant who wished to show that the landlord's title had expired, or where the defendant for some reason was estopped from directly denying the plaintiff's declaration. This plea is too full of technicalities and of too little use to be considered at length in this work. It has been almost entirely suspended by the codes and practice acts and amended rules of court now in force in the different jurisdictions.[53]

120. **Requisites of a good traverse.**—A traverse (denial) at common law should, in general terms, deny the allegations, or certain of the allegations, of the other party's pleading in the manner and form alleged. This is to put the adverse party to strict proof in establishing the facts as alleged and not simply to proof of the general effect of the allegations. The student should carefully read the form for the particular kind of plea or replication intended to be used and carefully follow it. In travers-

[53] For an illustration of the form of a special traverse, see State ex rel. Barrell et al. v. Christman et al., 2 Ind. 126, LEADING ILLUSTRATIVE CASES.

ing the other party's allegations he may deny an allegation of fact or an allegation of mixed fact and law, but he cannot traverse an allegation of law. If he wishes to question a matter of law he should do so by demurrer. Neither can he traverse a matter contained in a deed (which term embraces all contracts under seal), as he is estopped from doing so. He must deny that it is his deed, not merely aver that he did not covenant as expressed in the deed. This rule applies in all matters where he is estopped for any reason to deny the matters alleged by his adversary.

121. **Pleas of denial under the codes.**—The rules in regard to pleading a denial under the code are not uniform. In some states all pleadings must be verified under oath, and in those states the holdings are not uniform as to the force of this requirement in forbidding a general denial of facts, some of which may be true, even though the alleged cause of action does not exist. In other states the general denial is in common use. Where the general denial is recognized as a proper form of pleading it puts the plaintiff to the proof of his whole action. It also gives the defendant the right to introduce any evidence which will show that no cause of action ever existed in the manner stated by the plaintiff, including the right to negative any fact essential to a recovery by plaintiff. But the defendant does not have the right, under the plea of general denial, to prove mitigating circumstances or matter of estoppel, or that the contract sued on was voidable, or any other defense which does not really deny the facts that must

be proved to make out his adversary's case, or which involves an admission that the action once existed, but undertakes to show that it has been extinguished. Where the general denial is not recognized as a proper form of plea the defendant is required to deny specially the matters which he wishes to put in issue. In some states great latitude is allowed in the matter of denying the facts alleged, and also in pleading new matter, inconsistent paragraphs of answer being permitted to be filed together, if the pleader will brave the effect on the minds of the jury of confessing a fact in one paragraph while denying it in another. In other states pleadings are often struck out because the different pleas filed by the same party are so contradictory that they show lack of good faith. Any pleading may be introduced in evidence as an admission by the pleader, but its statements are subject to explanation and its weight as evidence is for the jury.

122. **Plea of confession and avoidance.**—If the pleader, at common law, wishes to set up new matter to avoid an action he is compelled to plead by way of confession and avoidance. The defenses thus pleaded are either of justification or excuse, or by way of discharge. Pleas of justification or by way of excuse, while admitting the facts alleged by the plaintiff, allege affirmative matter to show that the plaintiff did not at any time have a cause of action. The new matter thus alleged by the defendant is intended to justify, in law, the conduct with which he is charged by the declaration. Thus, a defendant sued for damages for an assault and battery may justify by alleging that the plaintiff attacked him and that he

committed the injury complained of in the necessary and proper defense of his person. Pleas by way of discharge admit that a cause of action once existed, but allege new matter showing that defendant's liability has ceased. Thus, a defendant may plead that he paid the note sued on and was released. Both of these pleas being allegations of affirmative facts, neither tenders an issue, but each closes with a verification and requires another pleading by the plaintiff to make an issue, either by way of a denial, or the allegation of new matter to overcome the facts stated in the plea and to carry the pleadings forward toward an issue. Pleas in confession and avoidance must admit, at least tacitly, that the facts alleged by plaintiff in the form in which they are alleged constitute a cause of action, and must undertake to show that the new matter alleged by defendant deprives the plaintiff of all right to press his action against the defendant. If the new matter alleged by defendant amounts to a denial that the cause of action ever existed, so that it could be proved under the general issue, the plea is insufficient. This is because the law will not permit an unnecessary postponement of the issue, and the defendant, having the opportunity to close the issue by a traverse, is required to do so directly, and not indirectly by alleging affirmative matter which would help to support a traverse. This rule is intended for a good purpose, but when enforced, without regard to its effect, it sometimes works a hardship. To overcome the strictness of the rule great latitude is allowed for presenting a defense under a plea of confession and

avoidance, if it shows color (an apparent right in plaintiff). Under many of the codes a person may plead his defense either by a denial or by alleging affirmative matter amounting to a denial of some material part of the cause of action; though denying by merely asserting the opposite is never commendable, even in jurisdictions where it is permitted.

123. **Same subject—Giving color.**—A confession of the cause of action, giving color (an appearance of right) to the other party's pleading, is an essential element of a plea in confession and avoidance at common law. As we have seen, a defendant who wishes to deny even the color of a right on plaintiff's part to maintain his action should do so by presenting a traverse and bringing the issue to a close, thus relieving the court and the plaintiff from the burden of filing useless pleadings. This rule requiring color to be given has produced much and extended reasoning and many distinctions. Color has been classified as express color and implied color. Implied color is where the defendant states matter not inconsistent with the allegations of the declaration, and his own averments impliedly recognize the sufficiency of the plaintiff's cause of action as pleaded, except as such action is defeated by the new matter alleged. Express color is where the defendant sets up an assumed and fictitious state of affairs as lending color to the plaintiff's cause of action, and then alleges new matter of defense to overcome the plaintiff's supposed case. The plaintiff is then forbidden to deny the fictitious matter thus alleged by his adversary in his favor, and is compelled to join issue on the

new matter of defense. The practice of using express color was adopted to get away from the strictness of the rule that the defendant must at least give color to plaintiff's action, and is used where the circumstances require new matter of defense to be pleaded, but do not permit the defendant in fact to confess the circumstances and conditions to be as alleged by the plaintiff. A full discussion of the subject of "color" would not be useful in this article, for much of the learning with relation to it is obsolete. But the student may find entertainment in reading Mr. Stephen's explanation of the subject of color.[54]

124. **Traverse and acceptance of issue.**—Rule IV (§ 109), requiring a party to demur, traverse, or confess and avoid at each stage of the action, is designed to promote the closing of the issue.[55] It only requires a party denying the pleading of his adversary to tender an issue on the matter denied so that a hearing may be had and the rights of the parties determined. The tender of an issue where the rights of the parties are not to be determined by mere reference to a record is a formal allegation at the close of the pleading as follows: "And of this he puts himself on the country." This is a formal request for a trial by jury and was originally used because the early English practice provided for trials by battle, and by walking on hot plowshares, and by oath, as well as by jury. The form of this conclusion remains, with all its legal meanings, though some of the reasons for its adoption have ceased to exist. The conclusion, "And this the said defendant is ready to

[54] Stephen, Pleading (4th Am. ed.) * pp. 202-215.
[55] § 109.

verify by the record," is still used in pleading a judgment of record as a defense, but all other forms of tendering issues are obsolete. Rule V (§ 109) compels a party who denies the facts alleged by his adversary to offer to submit the controversy for trial. Rule VI (§ 109), that "Issue when tendered must be accepted," only requires that the party whose pleading has been traversed (denied) shall accept the tendered issue and go to trial on the pleading which he has filed. There being no need for further pleading and the issue being upon the grounds alleged by such party, this was the only natural course. The issue may also be an issue of law instead of fact, and in that case the party is also compelled to join issue after his adversary has filed a demurrer. This issue, like the issue of fact, being upon matters alleged by himself, there is no reason to delay a hearing and decision of it. For these reasons a party is compelled to accept an issue whenever tendered. It requires merely a trial upon the field chosen by himself to which his own pleadings led the cause in reaching an issue.

125. **Departure not permitted.**—Rule VII (§ 109), that "there must be no departure in pleading," is designed to compel each party, plaintiff and defendant, to go forward in the same direction toward the formation of an issue through the whole series of pleadings in a case.[56] A "departure" is where a party in a later pleading of the same series deserts the ground taken in the next preceding pleading filed by him in the same case and resorts to another ground distinct from the basis of his former pleading

[56] § 109.

and not supporting it. There may be a departure by undertaking to allege facts inconsistent with what a party has previously pleaded, or by abandoning the legal ground on which a cause of action or defense set up by a prior pleading is founded and attempting to base a reply or rejoinder on a different legal ground. Neither a departure in matters of fact nor in matters of law is allowed, but the record must be a continuous whole, each successive step being based on the former proceedings in the case. A departure is not permitted under any system of pleading or method of forming an issue. Thus, where the complaint counted on an alleged fraudulent representation concerning goods sold, and the plaintiff, by his reply, set up that the defendant promised to pay the alleged damages, the court held that under the code this constituted a departure because the action was for a tort and the plaintiff, by his replication, attempted to support it by alleging a contract.[57] To permit a complete change in the nature of the case by way of reply would be, in effect, to countenance the beginning of a new action by that means, whether the change is in regard to the facts or as to the law under which the action is prosecuted. Even in the states using codes of practice a party cannot totally change the nature of the action by amendment, so that it becomes a new and entirely different kind of action in law involving an entirely different basis of liability and a different remedy.[58]

[57] Frank Brewing Co. v. Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30.

[58] Supervisors of Kewaunee County v. Decker, 34 Wis. 378, LEADING ILLUSTRATIVE CASES.

126. **General issue must be pleaded as such.**—Rule VIII (§ 109) requires that where any matter of defense set up by plea is in effect a denial of the whole or the principal part of the plaintiff's declaration, the defendant must plead such defense under the form of the general issue. This rule is so qualified as to permit the defendant to plead in confession and avoidance by giving color to the plaintiff's declaration, either by impliedly admitting plaintiff's right as alleged or by alleging fictitious matter to give the declaration express color, as was shown in another section.[59] Sometimes a defendant wishes to assume the burden of the issue in order to obtain the opening and closing of the trial and argument. At common law where his defense is really a denial of the action the rule under discussion would prevent the defendant from assuming the burden of the issue as having pleaded an affirmative defense, were it not for this exception. The rule was originally adopted to prevent confusion in pleadings by the presentation of new pleas when recognized pleas were available. An illustration of the operation of the rule is seen where a defendant sued for trespass for entering plaintiff's garden pleaded that plaintiff had no such garden; here it was held that the defense, coming properly under the plea of not guilty, was insufficient and amounted to no plea at all, and the defendant was required to enter a plea of not guilty.[60]

127. **Surplusage.**—Rule IX (§ 109) commands that surplusage be avoided.[61] Surplusage is matter

[59] § 123.

[60] 22 Year Book, 10 Hen. VI. 16 (Eng.).

[61] § 109.

contained in a pleading which is not necessary to the statement of the cause of action or defense. A good pleader will confine himself to the matters constituting his cause of action or defense without alleging what is unnecessary. Where surplusage is pleaded either at common law or under the codes the opposite party may move to strike it out if he considers it prejudicial to his case. A demurrer will not reach this defect if the pleading is otherwise sufficient. The party pleading surplusage takes the risk of the other party being able to gain some advantage from it, and if he can gain no advantage from it the adverse party may have it struck out at the pleader's cost. Unnecessary allegations sometimes prejudice the party who pleads them, while he cannot gain any advantage from them, because they will be struck out if his adversary demands it and he will not be permitted any benefit from them even if there is no motion to strike them out.

128. **Conclusion of pleas.**—Though many of the traverses at common law are in form affirmative, they are always in effect mere denials of what the opposing party has alleged. This being the case, the common traverse always ends with a demand for a jury trial in the words: "And of this he puts himself on the country." Where a party pleads new matter (there being as yet no issue) a demand for a trial would be premature. And as new matter in a pleading requires verification by proof at the trial, unless its truth is confessed by the adverse party in his next pleading, all pleadings at common law which do not tender an issue so as to require a

demand for a trial must close with a verification in the following form: "And this the said (name of pleader) is ready to verify." Where the new matter pleaded is a record the concluding clause is worded thus: "And this the said (name of pleader) is ready to verify by the said record." There are some other secondary rules concerning common law pleadings, but they have no place in an elementary treatise.

129. **Defenses must always be pleaded.**—A defendant must ordinarily plead any defense which he wishes to use at the trial whether it be a denial, or new matter, and any defense not interposed by plea or demurrer is ordinarily treated as waived. There are some exceptions to this rule, as matters of law and other things of which the court takes judicial notice, and like matters, as heretofore stated, need not be pleaded. It has been held under the codes that where a contract was void on its face, its invalidity need not be set up specially as a defense.[62] But unless the attorney is certain that the matter relied on as a defense comes within an exception, and has some authority in the form of a statute or court decision to prove to the court at the trial that there is such an exception, he should always lay the foundation for his defense by properly pleading it.

A defense can only be pleaded by a party in whose favor it exists and not by someone else who is in no way entitled to its benefit. Some defenses, such as fraud and estoppel, are personal defenses and can only be pleaded by the party in whose favor they originally existed unless the circumstances are such

[62] Gil v. Williams & Davis, 12 La. Ann. 219, 68 Am. Dec. 767.

that equity will apply the rule of subrogation in favor of another party who seeks to interpose them as defenses. At common law equitable defenses were not recognized. But all proceedings under the common law have now been somewhat modified to allow the application of certain rules permitting equitable defenses, though these modifications were all made by statutes which differ in the several states, and which each student must consult in his own state.

130. **Defenses generally.**—In most of the states it is provided by statute that a person joined as a party defendant may disclaim any interest in a property to which the title is disputed and may thus escape liability for the costs of the action where he has in fact not invaded or interfered with the plaintiff's right. The disclaimer should be full and complete, and when made is binding as a record against the one who pleads it and establishes his lack of title. Where the defendant has no interest but only an appearance of title shown by records and papers, and another owns the real interest, many states allow the person owning the real interest, at his own request, to be made a party defendant and to defend the action. Where a defense accrues after the action is begun the defendant may set it up. Under the common law he might plead such new defenses against the further continuance of the action where they arose before his plea was filed. If they come into existence after the plea has been filed, an additional plea called a plea puis darrein continuance (occurring since the last continuance)

must be filed, setting up the new defenses. Under the code, defenses arising after the commencement of the action may be set up in the answer, but they must be specially pleaded as having so arisen. The rules of the court, the statutes, and the practice of each particular court control as to the time given in which to plead or answer. Where there are several defendants they may generally either join in their defenses or defend separately, as they desire, each party pursuing the course he considers best. This is true even though the same attorney represents all of the defendants in presenting a joint defense. Where the parties sever their defenses the answer of one defendant cannot ordinarily be used against another defendant. In no event is it conclusive against any other defendant than the one who filed it, even though they are partners.[63]

131. **Partial answers—Set-off and counterclaim.** —In most of the states a defendant having a partial defense may plead it as such by answering only as to that part of the cause of action to which it affords a defense. But if a partial defense is pleaded as an answer to the whole action it will be insufficient. At common law a defendant could not set off one cause of action against another on which he was sued, though recoupment of a sum due the defendant on the same contract was sometimes permitted. But many of the states, by statute, now permit a defendant to plead, by way of set-off or counterclaim, a demand upon contract which would support an independent suit, as a defense or partial defense to an

[63] Grunenberg v. Smith, 58 Ill. App. 281.

action on contract. Matter so presented must be sufficiently pleaded to show a right of action in the defendant if he were bringing an independent action as complainant against this plaintiff as the defendant in such action. Where pleas of set-off and counter-claim are permitted they may be pleaded with an answer in bar but not with pleas in abatement. The Statute of Limitations, fraud, estoppel, or other special privilege, must always be set up by plea to be available as defenses.

CHAPTER IX.

THE PLAINTIFF'S SECOND PLEADING, THE CLOSING OF THE ISSUES, AND JUDGMENT.

132. **Replication—Plaintiff's second pleading.**—At common law if the defendant pleads anything but a traverse the plaintiff must reply. His replication, as it is called, must fully meet all new matter pleaded by the defendant. It may be either a denial or the statement of new matter which avoids the defense pleaded in the answer (or a combination of new matter and denial, where that is allowed by statute), the same as the plea.[64] At common law a replication of general denial was permitted to be pleaded in very general terms unless the defendant had pleaded new matter in justifying under an authority or title. The common law forms of replication were numerous and each had a different conclusion, for which the student is referred to any book of common law forms.

Under the law of many states if the defendant's pleading contains new matter the plaintiff is required to meet it as fully as the defendant was called upon to meet the plaintiff's first pleading or declaration. In some of the states no reply to defendant's plea (answer) is required, and the plaintiff is only required to plead again in case the defendant has

[64] Clearwater v. Meredith, 1 Wall. 25 (U. S.), LEADING ILLUSTRATIVE CASES.

pleaded a set-off or counterclaim. In those states where the replication is used the plaintiff has a choice of demurrers, motions, or pleas in bar, to meet the defendant's plea or answer. The demurrer has been considered in preceding sections. The same rules govern the filing of motions attacking the plea or answer which govern in the case of motions by the defendant relating to plaintiff's declaration (complaint). If neither of the remedies by demurrer or motion is adequate, the defendant must plead in bar. At common law his plea in bar of the answer was called the replication, as above suggested, while under the codes it is called the reply. Under most of the codes the reply is the last pleading of the series and is treated as denied without a rejoinder. But under the common law the parties must continue to plead alternately until one or the other pleads a traverse (denial) and an issue is thus reached.

133. **Replying new matter.**—The plaintiff, in setting up new matter in his replication, must be careful that it is consistent with the allegations of his first pleading (his declaration). If the declaration (complaint) and the reply to the defendant's plea (answer) thereto are contradictory or inconsistent, this will constitute a departure, and the replication will be insufficient to withstand a demurrer. What has been said under the rule against departure applies in such case.[65] Thus, where a complaint under the code counted on an alleged fraudulent representation concerning goods sold, a reply setting up a promise by defendant to pay the damages

[65] § 125.

claimed was a departure.[66] Matter which may be proved under the allegations of the first pleading (declaration) need not be alleged as new matter in the replication, but is fully available if a reply of denial is filed. No reply (replication) is necessary to affirmative matter in the defendant's plea (answer) which furnishes no ground of defense to the action, nor is it proper to file a replication to a plea of counterclaim or set-off. Pleas of counterclaim and set-off are treated as declarations, and pleas (answers) to them must be filed after the manner of answering the original declaration. Most of the states allow several paragraphs of replication to each plea or answer, but a few states still confine the plaintiff to a single reply to each plea as at common law.

Where several paragraphs of reply are permitted the same rules apply to each paragraph on the question of departure.

134. **Closing the issues and trial.**—Under the common law each pleading in succession may confess and avoid the preceding plea as long as the parties can continue this practice without either party traversing (denying) what the other has alleged, there being no fixed limit to the number of pleas required to reach an issue. Also when a traverse is pleaded and issue is joined the inquiry is only as to the fact denied, which sometimes has little bearing on the cause of action stated in the

[66] Frank Brewing Co. v. Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30. (This was an attempt to change an action in tort so as to support it by a contract.)

declaration. But the statutes known as codes and practice acts have limited the number of pleadings which may be filed in any series in nearly all jurisdictions.

Some modern statutes permit the filing only of a declaration and a plea or answer, and others provide for a declaration, an answer, and a replication. Each pleading of a series is ordinarily permitted to contain more than one paragraph, each of which may, in turn, be answered or replied to. But after the replication is filed (or after the answer is filed, if that is the last pleading provided for), it is deemed to make an issue even though it contains affirmative allegations, the affirmative matter being treated as if denied without a formal plea.

135. **Same subject.**—In most of the states which provide for filing a replication the defendant has the right to attack it by motions or demurrers, but if not attacked, or in case the attack is unsuccessful, it closes the issues, the law implying a denial of any new matter which it alleges. Where other pleadings, such as a rejoinder, surrejoinder, and rebutter, are permitted, they are presented, tested by demurrer or motion, and answered under the rules governing the declaration, answer, and reply. When the issues are closed at whatever stage of the pleadings, the case stands for trial in its turn, when reached by the court. It is then given a date for trial by the court, either by agreement between the attorneys for the parties, approved by the court, or on the court's own motion. Continuances will ordinarily be granted by the court to another time, upon agreement of the

attorneys for the parties or upon an affidavit by either party showing sufficient cause. Finally, when the case comes up for hearing, either before the judge or the jury, the issues formed by the pleadings in the case control the evidence which may be introduced, and any instructions to be given to the jury, and the scope of the judgment to be rendered after the trial has ended, whichever party recovers. The pleadings and the issues thereon are the foundation of the trial and judgment, and furnish the measure of what is to be inquired into, of what shall be decided, and what relief shall be given to the complaining party, in case he proves that he has been wronged.

136. **Verdicts and findings.**—In most of the states the statutes give a party the right to have a special finding of the facts by the judge, in case the trial is before the judge alone. Where this is asked the attorneys should each prepare a statement of all the facts which they think the evidence establishes, since facts supporting each element of the case must be found to support a finding for the plaintiff, or to overcome facts found for the plaintiff, where the decision is in favor of the defendant.

In trials by a jury some of the states provide for special verdicts, while others permit interrogatories to be answered by the jury. Where the jury only renders a special verdict, such verdict, like special findings by the judge, must find each element of fact necessary to support the decision.

The issues formed on the pleadings determine, in legal measure, the effect of a special finding, a special

verdict, or answers to interrogatories, since it is only those facts so found which are also alleged in the pleadings that can determine or affect the judgment to be rendered.

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Code Pleading: *Bryant,* Pleading Under the Codes; *Bliss,* Code Pleading (3d ed. by E. F. Johnson); *Phillips,* Code Pleading. There is in each of many states a treatise on pleading and practice, dealing especially with the local practice in that particular state. The student should consult a local work of this sort after he has mastered the general principles of the system.

QUIZ QUESTIONS

PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

(The numbers refer to the numbered sections in the text.)

1. (a) Of what do the pleadings consist? (b) How many pleadings are permitted in forming an issue: (1) at common law; (2) under the code?
2. (a) Why are pleadings necessary? (b) What would be the result of attempting to conduct trials without pleadings?
3. State what you know of the difficulty in devising satisfactory rules of pleadings?
4. What is the result of careless pleading?
5. What is the result of lax rules of pleading and carelessness in following such rules?
6. (a) Name the constituent parts of a court. (b) Do all courts consist of the same factors? (c) Name the factors essential to the smallest court. (d) Name the factors constituting the largest court with which you are acquainted.
7. (a) Are all systems of pleading uniform? (b) Is one system of pleading always used in all of the courts of the same country? (c) State what you know of English pleading and of the systems used.
8. (a) Where were the common law rules of pleading originally used? (b) Where and to what extent are they followed now? (c) Where are they still in full force? (d) Why should these common law rules be studied?
9. (a) What were original writs? (b) How did the parties at the earliest period of common law pleading declare their

causes of action and defense? (c) What were the use and effect of the original writ?

10. (a) What can you say about the choice of writ? (b) What was the result of choosing the wrong writ? (c) Why was the wrong writ sometimes chosen?
11. (a) Define an action at law. (b) Correctly speaking, what is a suit? (c) Is the distinction between actions and suits always recognized in speaking of them?
12. (a) How many classes of actions are there? (b) Name them. (c) Name the purposes for which each of these actions, severally, was used. (d) Into how many classes, naming them, were personal actions divided?
13. (a) What preparation is necessary for a student to be able to prepare pleadings in any particular state? (b) What must a lawyer do to prepare himself for drawing pleadings to use in another state than the one in which he is practicing?
14. (a) How may students obtain a practical understanding of the subject of pleading? (b) How may the student approach the subject of pleading to best advantage?
15. (a) Name some of the early English courts of limited jurisdiction. (b) Name the courts established in England by William the Conqueror. (c) What can you say of these last named courts? (d) What can you say of their jurisdiction? (e) Name the common law courts of England. (f) What was the court of chancery, and what was its purpose and jurisdiction?
16. (a) State what you can of the chancellor's powers. (b) What did he or his court have to do with the commencement of a common law action? (c) What did he do toward granting relief in his own court? (d) What was an ecclesiastical court, and what was its jurisdiction?
17. (a) What is the most common trial court of general jurisdiction in the United States? (b) State generally what is the jurisdiction of courts of this kind. (c) What can you say about the practice of law and equity in these courts? (d) What other courts of original jurisdiction are named in § 17?
18. (a) At early common law what must be done as preliminary to bringing an action at law? (b) What can you say

about the number and kinds of early common law actions? (c) For what did these actions provide remedies? (d) What was done to remedy the condition which was developed?

19. (a) What effect did the nature of the original writ have upon the action? (b) What was the result of choosing the wrong writ? (c) Are original writs still used? (d) What was the effect of the original writ upon the modern actions? (e) Why should a lawyer use known legal expressions in pleading, when available and applicable?

20. (a) What can you say about the development of abuses in pleading and their correction by statutes? (b) When was the first correcting statute passed?

21. (a) What is the first knowledge an attorney must seek when contemplating the bringing of an action? (b) Name the other matters with which he should acquaint himself before bringing the action. (c) What is the name of the plaintiff's first pleading?

22. (a) What must the plaintiff's attorney determine in relation to the parties before commencing an action? (b) How does a plaintiff bring the defendant into court to defend an action? (c) Can an action be prosecuted without notice to the defendant to appear in court? If so, when? (d) What will the plaintiff do if not all of the defendants can be legally served with notice? (e) Can the defendant in a civil action ever be arrested? If so, when?

23. (a) What should the attorney do in drawing his first pleading: (1) in a state using the common law rules of pleading; (2) in a state which has a statutory code of procedure? (b) What evidence should he keep in mind when he prepares this pleading? (c) What should an attorney keep in mind in preparing a plea for the defendant? (d) How should a plea of denial be prepared? (e) What can you say regarding new matter in a defendant's pleading?

24. (a) Where a right of defense is composed of several parts, how should the plea be prepared? (b) What will be the result if only one element is omitted? (c) In what form should the allegations be made?

25. (a) How many pleadings are available for the use of defendant? (b) Name them. (c) What is the nature of each of these defenses?
26. (a) What is a dilatory plea? (b) How many classes of dilatory pleas are there? (c) Name them. (d) What is the result of using them out of their order as named? (e) What further can you say in regard to the nature of dilatory pleas?
27. (a) If a defendant does not use a dilatory plea, what available defense is next in order? (b) What is a demurrer? (c) What can you say of the nature and use of a demurrer?
28. (a) How is a pleading made more specific? (b) Why not use a demurrer to question a pleading for indefiniteness? (c) What question should control in the use of demurrers and motions?
29. (a) If a defendant cannot escape defending the action on its merits, what should he do? (b) What is the defendant's pleading to the merits of the action called? (c) Of what may this pleading consist? (d) If defendant has several defenses, what may he do?
30. (a) What may the plaintiff do to overcome the defendant's plea to the merits? (b) What is a second pleading to the merits by the defendant called? (c) What may the plaintiff set up to rebut the allegations of this second pleading? (d) How many pleadings may be filed in forming an issue in court? (e) By what is the number governed?
31. (a) Of what importance are the pleadings and issues? (b) How is an issue of law formed? (c) How is an issue of fact formed? (d) When are amendments allowed? (e) How are issues of law tried? (f) How are issues of fact tried? (g) Of what importance are the pleadings after final judgment?
32. (a) What may a party do after a trial in which he has been defeated? (b) For what are new trials granted? (c) What is a motion in arrest of judgment, and when will it be sustained?
33. (a) How may a student obtain practical knowledge in the study of pleading? (b) What matters should he observe in his study at the court house?

34. (a) What real actions were there at common law? (b) What can you say about their use at this time?

35. (a) What personal actions were there at common law? (b) Into what two classes were they divided? (c) Name those classes. (d) How many actions did each class contain? Name the actions of each class.

36. (a) What can you say about the action of assumpsit? (b) On what kind of contracts may assumpsit be maintained? (c) What was the effect of a seal on a contract, at common law? (d) What effect does a seal now have on the rights of the parties to a contract? (e) Name all the different contracts you can on which assumpsit will lie. (f) When will assumpsit not lie?

37. (a) How many different classes of actions of assumpsit? Name them. (b) When will special assumpsit lie? (c) When will general assumpsit lie? State fully. (d) What is meant by the phrase, "waiving the tort and suing in assumpsit"?

38. (a) Name fully the circumstances under which an action in general assumpsit can be brought on a special contract. (b) What may the plaintiff do if he has a special contract which is just and not forbidden by the law, and the defendant has received benefit under it, but the contract lacks some formality necessary to make it enforcible? (c) If the defendant has prevented the plaintiff from fully performing his contract, what remedy has he? (d) By what action may a person collect for extra work where there was a special contract for the principal work?

39. (a) When does the action of covenant lie? (b) What other action will lie on a sealed instrument, and when? (c) What is meant by liquidated damages? (d) By unliquidated damages? (e) When will the action of covenant not lie?

40. (a) When does the action of debt lie? (b) What is essential for the maintenance of an action of debt? (c) What is the rule where the contract is payable by installments?

41. (a) What can you say of the action of account? (b) When will it lie? (c) What other action does it supplement?

42. (a) How many actions in tort are there? Name them. (b)

What are the differences between actions in tort and actions on contracts? (c) What is the difference between judgments on contracts and in tort? (d) Why these differences? (e) What difference in bankruptcy between debts on contract and in tort?

43. (a) When does the action of trespass lie? (b) When is the use of force implied? (c) Can trespass be maintained for a negligent failure to perform a duty? (d) Can trespass be maintained for an injury to a servant in which the servant participated?

44. (a) What relation must the force bear to the injury to support trespass? (b) Would trespass lie for wrongfully throwing a log into a highway and thereby causing injuries to a traveler who stumbled over the log? (c) Would trespass lie for the damage done by other people in coming to a show operated on plaintiff's ground without his consent and without right?

45. (a) What character of ownership must be shown to support trespass? (b) What defense has a wrongdoer against plaintiff's action as regards title to the property injured? (c) Can a plaintiff maintain the action of trespass after the defendant has given up the property? (d) What is the rule where property is in the hands of a servant when the injury is done? (e) Where the lands injured are occupied by a tenant at will?

46. (a) What character of title must plaintiff show to maintain trover? (b) What kinds of property may be recovered by trover? (c) What is the remedy? In trover, does plaintiff recover the property, or damages for the injury, or what satisfaction does he obtain? (d) How did the action of trover originate, and for what goods? (e) Can trover be maintained for goods wrongfully taken? (f) What is the gist of the action of trover?

47. (a) For what kind of property may trover be maintained? (b) If a man wrongfully came into a house and took out the chandeliers and sold them, could the owner maintain conversion? (c) Could the owner of an account recover in trover from a man who collected it, falsely representing that he was the creditor's authorized collector? (d) Could a livery stable owner recover in trover from one who hired

a horse and sold or kept it? (e) Will trover and trespass ever lie for the same act? (f) Are they in any way concurrent remedies? (g) What are their similarities, and what their differences?

48. (a) Under what circumstances does trespass on the case lie? (b) Can it ever be maintained when the owner is not in possession? (c) Under what different classes of circumstances will case lie? (d) For what wrongs or neglects on the part of the defendant will case lie? (e) Will case lie when no force is used? (f) For injuries to what kind of property will case lie?

49. (a) For what injuries was the action of trespass on the case originated? Describe its origin. (b) Under what circumstances must the plaintiff bring trespass on the case? (c) If a man should turn a wild beast into the street and it injured another, would trespass on the case be the remedy? (d) If a person built a fire and negligently permitted it to escape to the premises of another, would trespass on the case lie? (e) Would trespass on the case lie against one who forcibly plowed up a lane over which plaintiff had an easement of right of way, where the land was owned by the defendant?

50. (a) For what wrongs does detinue lie, and what remedy does it furnish? (b) For what goods may detinue be maintained? (c) What is the gist of the action of detinue? (d) May detinue be maintained for goods which were rightfully taken? (e) Under what circumstances, and upon what proof? (f) May detinue be maintained for property which was wrongfully taken? (g) Could detinue be maintained to recover radiators wrongfully detached from the heating plant and taken from plaintiff's building? (h) Could detinue be maintained for doors after they were hung as part of defendant's building?

51. (a) When and under what circumstances does the action of replevin lie? (b) What kind of property does replevin cover? (c) What judgment is given the successful plaintiff in replevin? (d) May replevin be maintained if the goods were wrongfully taken? (e) If rightfully taken? (f) How soon is any relief given after an action of replevin is begun? (g) Upon what act of plaintiff is this

first relief founded? (h) Is the common law action of replevin in general use? (i) Why?

52. (a) What is the primary object of the action of replevin? (b) What, if any, distinction is there between detinue and replevin? (c) Relate the procedure under the earliest practice at common law, and how, if at all, it has been changed.

53. (a) How is the action of replevin in this country governed? (b) What is the procedure in obtaining the writ of replevin? (c) Why the precautions? (d) What proof is necessary to support replevin where the goods were rightfully taken? (e) If a man wrongfully collected an account against one of your creditors, representing that he was your agent, could you bring replevin for the money?

54. (a) Name the common law mixed actions. (b) Which of these were the original mixed actions at common law, and what was the origin of the others?

55. (a) When does the action of ejectment lie? (b) What is the gist of the action? (c) What character of title must the plaintiff show to support ejectment? (d) What proof of title must be made by plaintiff to recover against a wrongdoer? (e) For what was the action of ejectment originated? (f) What can you say of the present use of the action of ejectment?

56. (a) What must plaintiff prove to recover in ejectment? (b) Against whom is the action of ejectment brought? (c) How is the action brought at common law, and how may the title of the land be put in issue and tried in this action? (d) Upon what proof must the plaintiff recover if he recovers in ejectment? (e) What damages were allowed in ejectment at common law? (f) What, under modern practice? (g) If the plaintiff in ejectment proved that defendant had no right or title whatever to the land, and that by will plaintiff was to receive $500 a year out of the rents of the land, could he recover on such proof?

57. (a) When was the action of forcible entry and detainer first used? (b) For what property does forcible entry and detainer lie? (c) Can forcible entry be maintained to recover a strip of ground where there is a standing dispute over a boundary line fence, the plaintiff claiming ten

feet beyond the existing fence? (d) What is the purpose of the action, and what conditions does it aim to promote? (e) What can you say of the importance of title to the property in the action of forcible entry and detainer?

58. (a) What can you say as to the importance of the form of pleadings in common law actions? (b) If you think the forms of pleadings of any importance, state why, and if not, state why. (c) What, if any, changes in these forms should a pleader make in using them?

59. (a) Compare the common law actions with suits in equity. (b) Compare the common law courts with the courts of chancery. (c) What was the measure of relief in the court of chancery under the earliest practice? (d) What, if any, change has been made in this measure of relief in equity?

60. (a) What can you say concerning juries in the court of chancery? (b) Name some instances where the court of chancery would act? (c) What must the petitioner show to obtain relief in a court of chancery? (d) Can you recite any maxims of equity? If so, recite them and state what they mean.

61. (a) What can you say of common law and equity courts in this country? (b) Compare the forms of pleading in common law and equity cases: (1) in courts governed by codes; (2) in courts governed by the common law rules and the old equity rules of pleading. (c) What must be alleged by a petitioner to support a suit in equity? (d) Why do these differences in pleading and practice exist as between the common law actions and suits in equity?

62. (a) What do you know about divorces? (b) Why did the condition you have described exist under the early English law? (c) What was an ecclesiastical court? (d) How is the subject of pleading in divorce controlled in this country? (e) What other actions are mentioned in the text, and how are they governed as to pleadings?

63. (a) What effect have the codes upon the common law rules of pleading? (b) When was the code of New York adopted? (c) Of what other state is the code followed in many jurisdictions? (d) Why were some codes adopted as models for others?

64. (a) Name some of the principal features of the codes. (b) To what extent does the form of action control under the codes? (c) What is the object of the codes in regard to actions?

65-66. What is required to be stated in a pleading under any of the codes?

What evidence should be pleaded under the codes?

When should you plead legal conclusions?

What is the effect where conclusions or evidence are pleaded instead of facts?

What was the common law rule of pleading facts?

What should a lawyer know in order to draw a pleading under the code?

What, in particular, should be studied in order to gain an understanding of the subject of pleading?

67. (a) What effect does the character of the action have on the pleadings in an action under the code? (b) What is the effect under the codes if the wrong action is brought? (c) What is the rule in regard to pleading a greater or less wrong than was really suffered by plaintiff?

68. (a) What do you know about special actions under the code? (b) What governs the procedure and recovery in special actions? (c) What rules of pleading ordinarily govern in these special actions? (d) Why are special actions provided by statute?

69. (a) What is essential before the plaintiff can obtain a judgment after preparing his declaration or complaint? (b) What is the rule in regard to serving notice to bring the defendants into court? (c) In whose name must an action be brought: (1) at common law; (2) under the code? (d) What exceptions are there to the code rule with regard to the person who shall be named as plaintiff?

70. (a) What was the rule at common law in regard to actions on assigned contracts? (b) What is the rule under the code? (c) What was the common-law rule in regard to the assignment of contracts? (d) What is the modern rule? (e) Can a party assign and thus transfer his liability? (f) Can a person assign a right of action in tort? (g) What partial exceptions to this rule?

71. (a) Who should be plaintiffs in an action? (b) Who

should be defendants? (c) Give the differences, if any, between the common law and code rules as to who are proper parties defendant. (d) What is the rule as to proper defendants in an action on contract (the contract being joint and several): (1) at common law; (2) under the code?

72. (a) What change is made by the code in the common law rule with regard to parties in actions in tort? (b) Where there is a joint interest, who shall be made plaintiffs at common law? Under the code? (c) Where the interest is not joint, what is the rule as to joining plaintiffs? (d) Who may be made defendants in an action? (e) What may a defendant to an action in tort do to compel the joining of other parties as defendants? (f) What to compel the joining of other parties as plaintiffs? (g) What, if any, remedy does the plaintiff have if he recovers a judgment in tort against one defendant only, and finds him without property, but discovers that there is another defendant also liable who owns property?

73. (a) What remedy does a defendant have for a misjoinder or nonjoinder of parties in an action on contract in each of the following cases: (1) parties plaintiff under the common law, the defect being apparent on the face of the pleadings; (2) when such defect is not apparent; (3) under the code, the defect of parties being apparent; (4) under the code, the defect of parties not being apparent? (b) What is the effect, at common law, of not raising an objection that there is a defect of parties? (c) What is the effect, under the code, of not presenting the objection that there is a defect of parties?

74. What is the result of misjoinder or nonjoinder of parties defendant, under each of the conditions stated in the questions under § 73, next preceding?

75. (a) What must the plaintiff do after he has the law and facts well in mind, and has decided who shall be made parties, and determined upon the remedy? (b) What else must he consider? (c) What may he do if he has several causes of action of the same character against the same defendant? (d) What was the early rule in England regarding the bringing of several actions of the same

class? (e) What practice is now allowed in some states as to permitting recovery in a single action for more than one cause of action? (f) State how this practice was developed.

76. (a) What is the rule in regard to joinder of causes of action? (b) What is the rule in regard to stating the same cause of action in two or more paragraphs of plaintiff's pleading? (c) What may the defendant do when the same cause of action is alleged in more than one paragraph? (d) What was the common law rule as to joinder of actions? (e) What controls as to joinder of causes of actions?

77. (a) How should the plaintiff prepare his pleading: (1) in a common law state; (2) in a code state? (b) What should be the special care of plaintiff's attorney in preparing a declaration under the common law? (c) What under the code?

78. (a) What is the rule as to pleading only pertinent and material matter? (b) What facts must be alleged in a pleading? (c) How may the facts be stated: (1) at common law; (2) under the code? (d) Must the law be stated in a pleading? (e) What is the rule as to stating matters of which the courts take judicial notice?

79. Repeat the rules of pleading given in § 79.

80. (a) What is the rule in regard to pleading evidence? (b) What is the rule as to pleading matters of which the court takes judicial notice, and of what do they consist? (c) What is the rule in regard to alleging matter which should come from the other side, and what does this rule mean? (d) What is the rule as to alleging presumptions and matters necessarily implied from other facts? (e) What can you say concerning prolix and verbose pleadings?

81. (a) When is certainty of allegation in a pleading excused? (b) What is the rule in regard to pleading collateral matter? (c) What effect does the nature of the thing sometimes have on the question of certainty of averments? (d) What is the rule of pleading where the facts are peculiarly within the knowledge of the adverse party? (e) What is the rule for pleading matters of inducement and aggravation? (f) What is the rule where the subject matter has

been modified by statute in relation to the mode of performance?

82. (a) To what pleadings do the rules stated in the three preceding sections apply? (b) What is meant by referring to a pleading as double? (c) What is the rule in regard to double pleadings? (d) What will result from a violation of the rule as to double pleadings? (e) How should a person state two grounds of action or defense? (f) What is the rule as to stating the same action differently in different paragraphs? (g) What is the rule as to stating one defense differently in different paragraphs?

83. (a) What is the rule as to alleging place? (b) Why is this rule necessary? (c) What is a videlicet and what is its use?

84. (a) What is the rule for alleging time? (b) To what extent is this rule enforced? (c) What is the rule in respect to alleging quality, quantity and value? (d) How is it enforced in the matter of stating quality? (e) How is it enforced as to stating quantity? (f) How and in what terms should value be alleged? (g) What is the rule in regard to pleading names, its meaning and the effect of its violation?

85. (a) What is the rule as to pleading title? (b) When is this rule applicable and what is the effect of its violation? (c) What is the rule for pleading authority? (d) What is its meaning and how is it applied? (e) How should authority be alleged?

86. (a) What is required as to certainty of allegations? (b) What is the real force and effect of Rule VIII? (c) What is the only safe rule as to certainty in pleading? (d) What is the effect if the facts are alleged with unnecessary certainty?

87. (a) How many rules are given to prevent obscurity and confusion in pleadings? (b) Repeat each of them. (c) Do they or do they not apply to code pleading? Which of them do not?

88. (a) What is meant by inconsistent or repugnant pleadings? (b) What is an ambiguous pleading? (c) What is its effect? (d) How will the ambiguous allegations of a plead-

ing be construed? (e) What is an argumentative pleading? (f) How should facts be alleged?

89. (a) What is meant by pleading in the alternative? (b) How should two matters be alleged, when one of them, if proved, will make out the cause of action or defense? (c) What is meant when pleading by way of recital is referred to? (d) What effect follows if matter of inducement is pleaded by recital? (e) What is the effect if an essential element of the cause of action or defense is pleaded by way of recital? (f) How should allegations of material facts be made?

90. (a) What is the common law rule in regard to pleading matters according to their legal effect? (b) What exception is there to this rule at common law? (c) What is the code rule with respect to pleading matters according to their legal effect? (d) What is the code rule for pleading the contents of writings sued on? (e) What is the rule concerning the use of forms of expression? Why follow this rule? (f) What is the rule as to sufficiency of a pleading bad in part? (g) Give a reason for this rule.

91. (a) What is the rule prescribing the proper conclusion of a declaration? (b) What amount of damages should be alleged? (c) Why is it necessary to allege damages? (d) What is the form of alleging the production of suit?

92. (a) What is the rule as to making profert of a deed? (b) What is meant by this rule? (c) When does the rule apply? (d) What is the code rule as to pleading writings sued on? (e) What is the rule in regard to exhibits?

93. (a) What effect has the mere copying of a written instrument in a pleading, without referring to its legal effect? (b) What is meant by oyer? (c) What is the rule as to craving oyer? (d) What is the rule as to pleading dates and names in instruments of writing which are pleaded? (d) What should be pleaded as to compliance with statutory requirements in regard to a written instrument?

94. (a) How should pleadings be entitled, and what should the title contain? (b) How are the pleadings subsequent to the declaration entitled where the parties are numerous? (c) How may the student get a concrete idea of pleadings in actual use?

95. (a) What facts must the plaintiff's pleading embrace? (b) What effect has the common law form as embracing facts not recited? (c) What information should the defendant be given by his adversary's pleading? (d) How should the plaintiff allege facts where the form he is following does not fully cover them? (e) Of what use are code forms of pleading?

96. (a) What do you know about pleadings which must be sworn to? (b) What was the equity rule as to verifying pleadings by oath? (c) What was the common law rule? (d) What is the rule in the United States? (e) What is the effect of omitting the oath where a pleading is required to be sworn to? (f) What can you tell about signing pleadings?

97. (a) What is meant by filing a pleading? (b) How is the filing of a pleading accomplished? (c) What is meant by the præcipe for a summons to issue? (d) What was the common law rule as to directing that summons should issue, and when it should be returnable?

98. (a) What is the rule as to filing the declaration before there is any right of obtaining relief? (b) What preliminary relief may be had in replevin and attachment? (c) What must be done before the court will undertake to render a judgment?

99. (a) What must a lawyer take into consideration when consulted by a client who has been sued? (b) What information should he obtain from his client? (c) What other information should he seek? (d) What matters of defense must he consider? (e) What objections may the defendant waive?

100. (a) What is said about choice as between dilatory pleas? (b) How many kinds of dilatory pleas are there? (c) Name each. Under what circumstances may each be pleaded? In what order may they be used? (d) Give the reasons you can remember for filing each kind of dilatory plea.

101. (a) What are pleas in abatement and to what do they relate? (b) When are pleas in abatement used? (c) Which of the dilatory pleas is a plea to the merits? (d) What is the effect of an effort by the defendant to get a

judgment on the merits under a plea in abatement? (e) Why is this rule?

102. (a) What is the effect of filing a plea in abatement and a a plea to the merits at the same time? (b) How are dilatory pleas construed? (c) What is the judgment when a plea in abatement is sustained? (d) What is the judgment when such a plea is overruled?

103. (a) What may the defendant do if he appears to the action and waives his right to challenge the jurisdiction? (b) How can the defendant obtain a decision as to the legal sufficiency of plaintiff's pleading? (c) What is a demurrer?

104. (a) What was the rule of the early common law for rendering judgment on demurrer? (b) What was the rule as to permitting amendments? (c) What is the modern rule with respect to demurrers and the amendment of pleadings?

105. (a) Is the old common law practice regarding demurrers still in use? (b) When are demurrers available? (c) What now determines the available grounds of demurrer? (d) Name some of the grounds for demurrer to a declaration often used. (e) How many classes of demurrer? Name them. (f) What are special demurrers?

106. (a) What practice may be followed where general demurrers are used, and under what conditions is this good practice, and why? (b) What is sometimes the effect of a special demurrer? (c) What does a demurrer question? (d) What defects are not questioned by a demurrer?

107. (a) When will a demurrer lie to a pleading subsequent to the declaration? (b) What does a demurrer to such a pleading question? (c) What is the effect if both the declaration and the plea are bad, and plaintiff demurs to the plea? (d) Give the reason why the demurrer has this effect.

108. (a) What is the rule as to the forms of pleadings and demurrers: (1) at common law; (2) under the code? (b) Where the allegations are sufficient, but too general, how does the opposite party require them to be made more specific? (c) Should the motion to make more specific always be used when available? Why? (d) Give the cor-

rect rule (in your own language) governing the filing of a motion to make more specific.

109. (a) What is defendant's first pleading called? (b) Repeat the rules on the subject of pleading as stated in this section.

110. (a) What is the general rule as to the time for filing a dilatory plea? (b) Why this rule? (c) What is the rule as to the order of filing dilatory pleas and defenses to the merits? (d) What is the consequence if a party uses a defense out of the order prescribed by law? (e) What is the reason for the rule requiring a dilatory plea to give a better writ? (f) What must be shown by a dilatory plea?

111. (a) What is the object of Rule IV? (b) Why is the motion used? (c) What pleading served the purpose at common law for which the motion to strike out is now used? (d) What is the remedy where a pleading is not signed?

112. (a) What defense may be offered where no benefit can result from a motion or demurrer? (b) Of what may a plea to the merits consist? (c) State the two principal classes of pleas in bar? (d) What is the most frequent plea: (1) at common law; (2) under the code? (e) What were the two common traverses at common law? Give their names. (f) Name the services which each performed.

113. (a) What is permitted in the way of denying part of a pleading and setting up new matter as a defense to part of it? (b) What is a traverse? (c) What is a denial? (d) What service does the general denial perform? (e) What can you say of its use? (f) State what you know of special denials.

114. (a) What can you say about traversing only part of the declaration or other pleading? (b) Why is this form of plea used? (c) When is a general traverse the proper pleading? (d) What is the usual form of general denial under the codes? (e) What is the name for pleading a general traverse at common law? (f) What exceptions are there to the right of pleading a general traverse at common law? (g) What is a frequent exception under the codes to the right of pleading the general issue? (h) How is the

execution of an instrument in writing denied under the codes?

115. (a) What was the plea of non assumpsit and what did it put in issue? (b) What defenses does it cover? (c) What is the rule as to pleading non assumpsit in actions on special contract? (d) When must the defendant plead specially?

116. (a) What is the general issue in debt on simple contract? (b) What is its form and what does it put in issue? (c) What is the general issue in debt on a sealed instrument? (d) Where the writing has no seal? (e) What does non est factum deny, and what does it put in issue? (f) What is the general issue in an action on a judgment? (g) What is the proper method of pleading a release depended on as a defense?

117. (a) What is the general issue in detinue? (b) What does it deny, and put in issue? (c) What is the general issue in trespass? (d) What does it deny, and put in issue? (e) If defendant wishes to justify an act he admits doing what must he plead? (f) What is the general issue in trover? (g) What does it deny, and put in issue? (h) What is the general issue in trespass on the case? (i) What does it deny, and put in issue? (j) What the general issue in replevin? (k) What does it deny, and put in issue? (l) Is this always the defense in an action of replevin? (m) If not, what other defense is sometimes pleaded? (n) What is the general rule applying to all general issues?

118. (a) Discuss the general issue as a replication? (b) When is it broad, and when not so broad?

119. (a) When is the special traverse a proper plea? (b) What is its form? (c) What is its use? (d) Is it much in use today?

120. (a) Describe the requisites of a good traverse. (b) What may be denied by the traverse? (c) Upon what is a party forbidden to form an issue by a traverse? (d) How may he raise an issue upon that matter if not by a traverse? (e) How may a party tender an issue on an instrument under seal?

121. (a) What is required as to the verification of pleadings?

(b) What defenses may be made under the general denial? (c) What cannot be shown by way of defense under the general denial? (d) What is the rule where the plea of general denial is not allowed? (e) What do you know about the joining of inconsistent defenses?

122. (a) What is meant by pleading in confession and avoidance? (b) What two general classes of pleas in confession and avoidance are there? (c) What is a plea in justification? (d) What is a plea in discharge? (e) Do pleas in justification and discharge tender an issue? (f) What is "color" in a pleading of confession and avoidance, and how must it be pleaded? (g) What is the rule where the new matter alleged really amounts to a denial? (h) Why is this rule enforced? (i) What is the general rule of the codes on this subject?

123. (a) What is required as to giving color to the opponent's pleading when answering specially? (b) What two classes of color are there? (c) Name them. Define each. (d) Why was the rule of express color adopted?

124. (a) Why does the rule exist which requires the defendant either to demur or plead? (b) What were the formal endings of pleas and why were they used? (c) Why was the acceptance of an issue required whenever tendered?

125. (a) What is a departure? (b) How may a departure occur? (c) Under what systems of pleading, if any, are departures allowed? (d) Give an example of departure. (e) Recite the rule forbidding departures in pleading.

126. (a) When and how should the general issue be pleaded? (b) How is this rule qualified? (c) Why is the rule so qualified? (d) Why was it adopted? (e) Give an illustration of the rule as to pleading the general issue whenever it covers the defense offered.

127. (a) What is surplusage? (b) When may surplusage be used in a pleading? (c) To what should a pleader confine his allegations? (d) How may a pleading be purged of surplusage?

128. (a) Recite the rule prescribing forms of conclusions to be used in pleas. (b) What does each conclusion mean? (c) When is a conclusion to the country proper? (d) When is a verification proper?

129. (a) Under what circumstances must the defendant plead a defense? (b) What rule should guide an attorney in deciding whether or not to plead a defense specially? (c) What action must be taken to present an equitable defense?

130. (a) What is meant by a disclaimer? (b) What is its use? (c) What should it embrace? (d) How may a defense be pleaded which arises after suit: (1) at common law; (2) under the code? (e) How soon must the defendant answer? (f) What controls as to the time of pleading? (g) What is the rule as to joining and separating defenses?

131. (a) What is the rule as to pleading partial answers: (1) at common law; (2) under the code? (b) What is meant by set-off? (c) By counterclaim? (d) What are the rules governing their use?

132. (a) What is the plaintiff's second pleading called? (b) What must it contain? (c) What is the effect of pleading new matter in it? (d) What effect has a reply of denial? (e) What was the rule at common law? (f) At present, in many states? (g) What limit is imposed, in some states, upon the number of pleadings by plaintiff? (h) What general rules govern the second pleading by plaintiff?

133. (a) Why must plaintiff conform his second pleading to the allegations of his first pleading? (b) What can you say of departure? (c) Where the plaintiff's plea is insufficient, what is the rule as to procedure? (d) What is the rule regarding the number of paragraphs of reply to a single paragraph of plea?

134. (a) What rule regulates the closing of the issues: (1) at common law; (2) under the code? (b) What, if any, limitation is put upon the number of pleadings in a series to prove an issue?

135. (a) What pleadings may be filed after the replication? (b) When is the case ready for trial? (c) What effect have the pleadings on the proceedings at the trial?

136. (a) What do you know about new trials? (b) What should the attorneys do on motion for a new trial? (c) What is a special verdict and what must it contain? (d) What effect have the pleadings on the judgment rendered?

PART II

PRACTICE IN CIVIL ACTIONS

BY

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PREPARATION FOR TRIAL

CHAPTER I.

BEGINNING SUIT.

1. **Praecipe.**—A civil suit at law is usually begun by the filing of a praecipe with the clerk of the court. This is, in effect, a written order directing the clerk to issue a summons to the defendant or defendants named in the praecipe. In some jurisdictions a praecipe must be filed before a writ is issued. In most jurisdictions the clerk of the court may waive the formal filing of a praecipe and issue the writ upon the filing of a declaration, statement of claim, or complaint. The praecipe should correctly set forth the names of all parties to the cause, the term of the court at which the defendant must

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appear, the direction for the issuance of a summons, and the signature of the plaintiff or his counsel.

2. **Who should be parties plaintiff.**—It is the general rule that any natural person may be made a party plaintiff in an action at law, and usually this rule will include all persons whether they are citizens or aliens, adults or minors, incompetent or insane. There are, however, exceptions to the rule, one of which is that a person who is regarded by the law as civilly dead cannot be a party plaintiff. In some jurisdictions this includes persons who have been convicted of a felony and sentenced to a term of imprisonment in a penitentiary. In most of the states the rule does not extend to convicted persons unless by the law the estate of such person has been forfeited.

In practically all jurisdictions an artificial person, such as a corporation, may be a party plaintiff, whether such corporation be foreign or domestic. Most of the states have passed laws restricting the rights of foreign corporations to prosecute actions within their jurisdictions, and require that before an action can be maintained by a foreign corporation, the prescribed regulations governing its right to sue must have been specifically followed. Unincorporated clubs and societies by special statutes may sue and be sued in their own names. An action cannot be maintained in a mere trade name, because it has no legal entity. It is a general rule that the plaintiffs in an action must be the real parties in interest. However, an action may sometimes be brought involving property rights in the names

of the parties who hold both the legal title and the beneficial ownership to the property involved, or in the name of the party who is either the legal or the beneficial owner.

3. **Who should be parties defendant.**—It is a rule of universal application that all parties defendant must have a legal entity and must have in some manner infringed the rights of the plaintiff. An unincorporated company, association, club, or society may, however, be sued in its own name by virtue of special statutes. This was not permissible under the common law, the rule of which prevails in some states to this day and requires that in order to recover against an unincorporated organization the individual members thereof must be sued. Not all legal entities, however, may be made parties defendant in an action though they may have infringed upon plaintiff's rights. It is usually provided by statute that states and counties may not be made parties defendant in actions brought in their own courts; and in jurisdictions where felons may not sue as parties plaintiff, they may be sued as parties defendant; parties under legal disabilities, such as minors and insane persons, can only be sued through their guardians, conservators, or other legal representatives.

4. **Who may be made joint plaintiffs.**—Under the common law all the persons to whom the defendants were legally answerable for the injury complained of must be made parties plaintiff, in the action. If several persons were legally answerable to the plaintiffs for a grievance, an action in the

name of one of them could not be maintained. It was equally true that if the action was several there could not be a joinder of plaintiffs, but each one injured could maintain his action against the defendants. The common law rule has been greatly modified in most of the states, and many actions that were formerly joint or several are now by statutes made joint and several.

5. **Misjoinder and non-joinder.**—The misjoinder of plaintiffs in actions growing out of a breach of a contract is fatal, but the burden of showing that too many persons are joined as plaintiffs is upon the defendant. A misjoinder of defendants is equally fatal, but the defect may usually be cured by amendment. A failure to join, in actions ex contractu, all the defendants jointly liable is erroneous, and advantage of it may be taken at any time during the progress of the proceeding. The rule, however, is different in tort actions; a misjoinder of plaintiffs in such actions will usually defeat a recovery, while a misjoinder or non-joinder of defendants will not. A verdict against one of several joint tort defendants gives no ground for complaint by that party because the other defendants were not included in the verdict; nor is a non-joinder of defendants, all of whom may be liable for an action ex delicto, erroneous. In most of the states amendments are freely permitted, to cure both the non-joinder or misjoinder of either plaintiffs or defendants.

6. **Service of writ.**—The service of a summons is required to give notice to the defendant that he is

a party to the proceeding. Jurisdiction of parties is only obtained by the service of process. The particular method of obtaining service is governed by statute and differs in different jurisdictions. It is always requisite that the direction of the statutes be specifically followed. Service in most cases must be made by the sheriff or bailiff of the court. In some instances, it may be made by private persons deputized by the court for that purpose. In no event, however, can a person interested in the outcome of the cause be permitted to serve the process. It is requisite that such service be had within the territorial jurisdiction of the court issuing the writ. Special statutes provide for service upon persons residing outside the jurisdiction of the court, but such service cannot give the court jurisdiction to render a personal judgment. Service may be made in some states by delivering a copy of the writ to the defendant, or by reading the same to the defendant, or informing him of its contents.

7. **Motion to quash the return.**—Upon the return of the writ by the executing officer, the defendant, if he desires to avail himself of any error in the service or return, should at once file a motion to quash the return or the writ itself. Any error appearing upon the face of the writ or of the return may be reached by such motion to quash. For instance, if it appears to have been served outside the jurisdiction of the court, or outside the time limited by the terms of the writ, or by one not duly authorized to execute it, advantage may be taken of such defect by a motion to quash. If, however,

the defect in the writ or in its return is not apparent upon its face, advantage must be taken of such defect by a plea in abatement. Among defects cognizable by plea in abatement are fraud in enticing the defendants within the jurisdiction of the court, service upon exempt persons, such as members of legislatures, judges, jurors, etc., or service upon the wrong party. Leave may be given to amend the return as to its form, but if quashed a new writ may issue in the same action.

8. **Pleadings.**—The subject of pleadings is treated in another part of this work, but mention of it here is necessary, because the character of the pleadings to such a large degree determines the methods adopted in the trial of the cause. For illustration: If to the common law declaration is joined the plea of the general issue, the burden of proving every allegation rests upon the plaintiff. If, however, as is now the case in many jurisdictions, instead of the common law pleadings the plaintiff is required to file a simple, detailed statement of his claim, verifying the same by affidavit, and the defendant is required to file a concise, verified statement of his defense, answering in detail the items in plaintiff's claim, then the trial, instead of throwing upon the plaintiff the burden of proving everything material to his case, obligates him to prove only such matters as are controverted by the defendant's affidavit. This requires a much closer examination of the pleadings and oftentimes a complete change in the manner and order of introducing evidence.

9. **Written interrogatories.**—The practice has quite generally been adopted of allowing either party, after a cause is at issue, to file written interrogatories directed to the opposing party and to obtain from the court an order requiring such opposing party to answer under oath such interrogatories within a fixed day. The character of such interrogatories is usually determined by the court. If the party ordered to answer, either refuses to answer or answers evasively, he may be punished for contempt or directed to answer over, or if party plaintiff, his action may be dismissed, and if defendant, judgment may be entered against him as by default. When a corporation is a party, the interrogatories should be addressed to it, and a refusal to answer may be punished in the same manner as in the case of an individual. A corporation when ordered to answer cannot refuse, on the ground that it is an artificial person and cannot give testimony, but the answers must be given in the name of the corporation by any officer or agent who possesses the information called for.

CHAPTER II.

PRELIMINARY MOTIONS.

10. **Motion for judgment on the pleadings.**—If it appears upon the face of plaintiff's declaration or complaint that the court is without jurisdiction to try the cause, the defendant should move for judgment at the earliest opportunity, or if when the defendant has filed his pleas, it appears upon the whole record that such pleas are not sufficient in law to defeat the action, plaintiff should move for judgment. In some jurisdictions the usual motion under such circumstances is to strike from the files an adversary's pleading and for judgment.

11. **Default.**—By default is meant failure of a party to the suit to take one of the steps in the progress of the lawsuit required by law or rule of court. If the defendant fails to enter his appearance the plaintiff is entitled to a default and judgment. The manner of taking such default is dependent almost entirely upon statutory enactments or rules of court. When a party to an action is defaulted for want of an appearance or for a failure to take any other step arising in the course of the proceeding, such default may be vacated by promptly applying to the court and presenting, by means of affidavits, the causes which led to the default. The vacation of default orders rests in the sound discretion of the court. Prompt action in

making an application is always necessary, and if the term at which the default was entered is allowed to go by, the court is usually left without jurisdiction to reinstate. The motion to set aside a default may be granted upon condition of paying costs or without such condition. Care must be exercised in applying for a default and judgment, that defaults are taken only against the parties who have been properly served. Where there are several joint parties to an action, some of whom have appeared and filed pleas and others have not, a default may be taken against those who have been properly served and have not appeared, and a verdict against those who have appeared. In actions ex contractu default and judgment against certain joint defendants who are served and failed to appear, and a judgment in favor of other joint defendants who have answered, is erroneous and must be set aside. In actions sounding in tort a judgment may be taken in favor of one or more joint defendants and against other defendants in the same action. In such actions a judgment against part of the joint defendants will operate as a dismissal against all other defendants in the cause.

12. **Change of venue.**—The strict meaning of the word "venue" is the place whither the jurors are summoned to come. Changes of venue are allowed upon two grounds: Because of the prejudices of the inhabitants of the place where the trial is to be held, and because of the prejudice of the trial judge. The meaning of the term was originally confined to the former ground, but it is now generally used

in both senses. In order that a change of venue may be granted for any reason, it is always required that the application for such change be made at the earliest opportunity, after the knowledge of such prejudice has come to the mind of the moving party. The right to a change of venue may be waived either by delay in making the application, or in some cases, by pleading to the action without objection, or by entering into stipulations affecting the rights of the parties in the cause. Changes of venue will not be granted merely for delay. In order to entitle a party to a change of venue because of the prejudice of the judge, it must appear that such prejudice is against the complaining party. A prejudice against his lawyer is not sufficient.

Of course, the application for the change of venue must be made to the judge before whom the case is pending, and in many jurisdictions that judge, if the application is made in accordance with the express provisions of the statute, has no discretion, but must grant the change. In other jurisdictions, the granting of the change of venue is discretionary with the trial judge. In practically every jurisdiction in the United States a change of venue is purely a statutory right and will not be granted unless the statute has been specifically complied with. In order that the prejudice of a judge can be urged as a ground for a change of venue, it must be alleged in the petition for such change that the petitioner believes he cannot secure a fair trial before such judge.

13. **Motion to advance the cause.**—It frequently happens after a cause is at issue that, for some reason, it is important to have the action tried at an early date. If counsel for either party desires to have a cause advanced from its regular place upon the trial calendar to which it has been assigned by the clerk of the court, he should make a written application to the court supported by affidavit, setting forth the particular reasons why such cause should be tried out of its regular order and ahead of other causes that have been pending for a longer period of time. The motion is directed to the discretion of the trial judge and usually will be granted, if the reasons given therefor are such as would warrant the conclusion that injustice will follow if the cause is not advanced. Serious illness, or a necessary departure from the country are proper considerations for such a motion.

14. **Motion to continue the cause.**—It much more frequently occurs that one or more of the parties to an action will not be prepared for trial when the cause is reached regularly upon the calendar. Often the witnesses are beyond the jurisdiction of the court or the parties are sick or unable for some reason to appear in court, or the nature of the action is such that sufficient time has not been allotted the parties to properly prepare for a trial of the issues. In all such cases proper application must be made to the trial judge at the earliest opportunity to continue the cause, either to the next term of court or to some subsequent date, when the cause for the continuance will have been removed. All such ap-

plications for continuance should be supported by proper affidavit of the parties. If one or more of the parties or their counsel are members of congress or of a legislature the law generally requires that the cause be continued until the adjournment of such legislative body.

15. **Setting a cause for trial.**—It is usual for the clerk of the court at stated intervals to make up a calendar of cases which are to be called for trial in the order in which they were filed in court. In some jurisdictions it is error to call cases out of the regular order unless an application upon proper notice has been made to the court to advance such cause or to set it for trial at some specially named date. In most jurisdictions a preliminary call of such calendar is made by the court at the opening of each term of court, and the cases are at that time set for trial on definite dates. It will not generally be held reversible error to call a case out of its regular order unless the party complaining can show that he has been injured thereby.

CHAPTER III.

NON-JURY CASES.

16. **Trial by court without a jury.**—Nearly all state constitutions preserve to every citizen the right to a trial by jury in civil actions at law, as well as in criminal matters. It is, therefore, often urged that such right can in no way be abridged or taken from the citizen. In England the right to a trial by jury in civil matters rests generally in the discretion of the court, and in practice in that country less than one per cent of the actions at law are tried by a jury. The usual practice in the United States has been to require the plaintiff, upon bringing his suit, to pay to the clerk of the court a fee sufficient in amount to cover the expense of the trial by a jury. In some jurisdictions, however, the practice has more recently been adopted of leaving it optional with the plaintiff when he files his suit to demand a jury trial. In these jurisdictions, if the plaintiff wishes a jury trial he must make a written demand therefor and pay a certain stipulated jury fee. If, on the other hand, he desires his case to be tried by the court without a jury, the fee required to be paid by him is much less than where a jury is demanded. If the plaintiff fails to demand a trial by jury the defendant upon entering his appearance may demand such trial and pay the customary jury fee, or he, too, may waive trial by jury and pay the

lesser fee required under such circumstances. While the constitutions of the several states grant to all litigants the right to trial by jury, such right does not imply that a litigant is entitled to the services of the jury without cost, but is a right of the same nature as the right to have all other official services performed by public officers upon the payment of certain required fees. If the jury is waived the court is required to assess the damages as well as to determine all other issues of fact.

17. **Reception of evidence by the court without a jury.**—In a trial of the issues by a court without a jury, the evidence is received in the same manner as if a jury was in the box, and the parties desiring to object to any evidence because of its incompetency or immateriality, or for any other reason, must make such objections during the progress of the hearing, and secure from the judge a ruling thereon. Upon a review by a court of appeal of the evidence heard, in common law actions, by a court sitting without a jury the same presumptions are indulged in reference to incompetent and immaterial evidence as are held by chancellors sitting as judges of both the law and the fact, it being presumed that the court considered only competent and material evidence in making its finding.

In some jurisdictions it is required that in order to preserve an exception to the ruling of the court upon any question arising upon the trial it is necessary that an exception to such ruling be taken and noted in the record. In most jurisdictions, however, it is not necessary during the trial to take for-

nal exception to the rulings of the court upon re-
eiving or rejecting evidence offered, but such ex-
eptions save themselves and are open for review
n appeal or error.

18. **Submission of propositions of law or fact.**—
In order to preserve the rulings of the trial court
or review upon questions either of fact or law,
ounsel for either party is generally required by
aw to submit to the court written propositions and
equest the court to mark the same as, "held," or
"refused." If it is desired by either party that the
rial court make a specific finding upon any ques-
ion of fact, he may incorporate such finding of fact
n a written proposition and submit the same to
he court, or if it is desired to preserve for review
pecific propositions of law arising in the course
f the trial, a party should submit to the court in
vriting such propositions, and in some jurisdictions
he court has no discretion but must mark all such
propositions so submitted and file the same for rec-
rd in the cause. In some states it lies within the
liscretion of the court to make specific findings
pon such propositions. Some courts of appeal have
he right to review questions of law only, while
thers may review both questions of law and fact.
Unless propositions of law have thus been sub-
nitted to the court sitting without a jury, and the
ourt has indicated its finding upon each of such
propositions, there is nothing for a court of appeal,
vhich has jurisdiction to pass upon questions of law
nly, to review. Where an appellate court has juris-
liction of questions both of law and of fact, it is not

generally necessary to submit propositions of law to such court.

19. **Findings of law and fact by the court.**—After the evidence has been submitted to the court sitting without a jury the cause is open for argument of counsel in the same manner as if it were heard by a jury, and the cause is not finally submitted until such argument has been closed. The court is required to make its finding both upon questions of law and fact, such finding when entered of record having the same force and effect as the verdict of the jury. This finding, however, may be amended or modified in any particular by the judge making the same, during the term or within such time as the court has jurisdiction of the cause. The defeated party may make a motion either for a new trial, or in arrest of judgment, or both. Such motions will generally be disposed of at once, but may be reserved for future consideration. If they are overruled judgment will be entered upon the finding.

20. **Judgment on finding.**—The judgment when entered upon a finding of law and fact by the court has the same force and effect as a judgment upon a verdict, and is conclusive of the issue unless set aside by a court having jurisdiction to review it. Errors in the entry either of the finding or of the judgment may be corrected by the court during the term at which the same were entered. Errors, however, that appear clearly upon the face of the record may be corrected after term time.

21. **Appeal and error.**—In seeking a review of a judgment entered by a court without a jury the

defeated party has substantially the same remedies as in a case tried by a jury. By reason of the presumptions indulged in favor of the court's findings upon the question of fact, that only competent evidence was considered, although incompetent evidence may have been heard, the defeated party cannot urge error on account of the reception of such evidence. Execution may issue upon such judgment at any time after the same has been entered, unless the judgment debtor at once takes such steps as are necessary to secure an appeal, and a stay of execution. It is always required that in prosecuting an appeal or writ of error, the statutes be strictly followed. Any deviation therefrom will generally result in the dismissal of the appeal or writ.

CHAPTER IV.

JURY TRIALS.

22. **Right to a jury trial.**—The right to a trial by jury was first guaranteed in the Magna Charta, but was exercised in a limited way prior to the granting of that instrument. The English colonists settling in America brought with them this practice, and the constitutions of substantially all of the early colonies provided that the right to a trial by jury should remain inviolate. Gradually, by statutory enactment the right to a trial by jury was limited to certain kinds of actions, until in most of the American jurisdictions it is now denied in equity and probate proceedings, and in certain other forms of actions. It has generally been guaranteed in all state constitutions for all forms of civil common law actions, the particular method of securing a trial by jury being reserved for the determination of the legislatures of the several states.

By a jury is usually meant a body of twelve men possessing certain defined qualifications, and competent under the particular statutory enactment. In some states less than twelve men under certain circumstances may constitute a valid jury.

23. **Qualification of jurors.**—The qualification of jurors is left to the determination of the legislative bodies of the several jurisdictions. It is universally required that the jurors be physically able to per-

orm their duties, that they shall be able to see, hear, nd to otherwise possess such a degree of health as ill enable them to give proper attention to the evi- ence in the case. They must also have certain edu- ational and intellectual qualifications, and be able o understand the ordinary terms used in the con- uct of a trial. It is required that jurors be drawn rom the county, district, or from within the juris- iction of the court to which they are summoned. Some states require that jurors shall possess cer- ain property qualifications and usually it is re- quired that they be citizens residing in the district where the court is held. But few jurisdictions now require property qualifications for jurors.

24. **Jury lists.**—At the common law no jury lists were prepared, and in some jurisdictions today, when a jury is required in the trial of a cause, the sheriff is usually commissioned to summon the re- quired number of jurors for a particular case, or for a term of court. It is the general practice in the several states and jurisdictions to prepare jury lists of persons eligible for service. The effect of such statutory provision is to take the selecting of jurors out of the hands of the sheriff and place it in the hands of jury commissioners, whose duty it is to prepare in advance a proper list of the men who are eligible for jury service, and to certify such list to the clerk of the courts where the jurors are to serve. Jury commissioners in selecting these lists are usu- ally not limited to any particular method, except it is required that the names must be selected with- out distinction from all the persons of the county or

district qualified to serve. In large municipalities the list is usually made up from the names appearing in the city directories. In making up the list it is requisite that the names of those who are exempt from jury service shall not be included. Usually attorneys, judges, ministers of the gospel, teachers, and judges and clerks of election are exempt.

25. **Drawing the jury.**—It is usually the practice to have a box in each court room where a jury is required. In this box are placed all the names of jurors assigned for service in that court during the term. When a case is called for trial it is the duty of the clerk to draw the names from the box, and unless good reason is shown, it is required that the jurors take their places in the jury box in the order in which their names are drawn. In practice it frequently happens that the names are called, in regular order, from a list furnished to the clerk, and the jurors are required to take their places in the order in which their names are called.

26. **Examination of jurors by the court.**—The duty of examining jurors, in most instances, rests upon counsel in the case. However, in many jurisdictions that duty is primarily placed upon the judge, who may examine the jurors himself or may delegate such examination to the counsel representing the parties in the action. If it is desired by counsel for either party to challenge the array it is necessary that such challenge be made at the earliest opportunity.

27. **Examination of jurors by counsel.**—The purpose of an examination of jurors preliminary to the

trial is three-fold: that the parties litigant may determine whether or not they desire to challenge the array, to challenge the jurors peremptorily, or to challenge them for cause.

One of the greatest abuses of our American trials is the long drawn out examination of jurors by counsel. In this examination the inquiry must be specifically directed, first to the determination of whether a challenge to the array should be allowed; second, to the determination of whether one or more of the jurors are disqualified for service, either because of physical, mental, educational, or intellectual deficiencies, or because such juror may be in some way connected or related to one of the parties to the action, or may be exempt or incompetent for some other reason; and third, whether or not the party examining wishes to exercise a peremptory challenge. On the ground that the party may desire to exercise such peremptory challenge, because of bias or prejudice, wide latitude is usually permitted in the examination of jurors, and the trial, in a strongly contested case, is often unnecessarily prolonged thereby.

28. **Challenge to the array.**—In civil actions, a challenge to the array is unusual, and such a challenge is only entertained by the court where it is made to appear definitely that the jury lists were improperly prepared, the jury panel improperly drawn, or the jury summoned from without the jurisdiction of the court. The fact that some of the jurors in the panel are incompetent for service is not ground for a challenge to the array.

29. **Challenge for cause.**—The right to challenge a juror for cause is coincident with the right of trial by jury, for the right to a trial by jury presupposes that the jury shall be made up of men who are unbiased, and who are otherwise competent to serve as such. In some states the right to challenge for cause, is limited by special statutes. Usually the challenge must be based upon some disqualification of the juror which would render him incompetent to serve in the case before the court. In the earlier stages of trial by jury it was the practice to call but one juryman in the box at a time and counsel were required to examine him fully, and exercise the right of challenge before another juror was called. Under nearly all of the present statutes, however, counsel will not be required to exercise the right of challenge before the panel has been filled by twelve jurors. The right to challenge a juror for cause must be exercised before the juror has been sworn to try the case. If, however, ground for the challenge appears after the juror has been sworn the court may excuse the juror, but a refusal to excuse such juror is not reversible error, unless injury to the party complaining is shown.

30. **Peremptory challenge.**—A peremptory challenge is one made without assigning any reason therefor. It is an absolute right guaranteed by the statutes in the several jurisdictions, and cannot be limited or restricted by the court, nor can the court require the party exercising the challenge to give a reason therefor. No such thing as a peremptory challenge existed at common law, and the practice

s controlled purely by statutory enactment. The number of jurors who may be peremptorily challenged in civil actions varies in different jurisdictions and is usually from two to five. The number allowed in criminal actions is much larger than in civil actions. As a general rule the latitude permitted in the examination of jurors, for the purpose of exercising peremptory challenges, rests in the discretion of the court and such questions will be allowed as are necessary to properly test the bias of the juror. The fact that a juror is prejudiced against an unlawful business is not ground for challenge for cause, nor is it proper to ask a juror in a case, where the conduct of an illegal business is involved, whether or not he is prejudiced against such business. It is generally permissible, however, to ask questions touching such prejudice for the purpose of exercising peremptory challenges.

31. **Swearing the jury.**—It is usually the practice to reserve the swearing of the jury until all the jurors have been selected and the parties have had an opportunity to exercise their challenges. It was formerly the practice that jurors were sworn one by one immediately at the close of their separate examinations. It is not essential that a juror be sworn in civil actions, and if the parties proceed to trial without an oath having been administered, it will be presumed that they meant to waive the formality of an oath. No particular form of oath has been generally adopted. Some legislatures have prescribed the form of oath to be taken by jurors. The usual oath merely requires that the jurors shall

well and truly try the issues joined between the parties and a true verdict render. Where a default has been entered and the jury is called to assess damages only, a different form of oath should be used, the jury being then required only to well and truly assess plaintiff's damages. The oath is generally administered by the clerk of the court, but it may be given by the judge or by anyone else who has authority to administer oaths.

THE TRIAL

CHAPTER V.

OPENING STATEMENTS—EXCLUDING WITNESSES—DEPOSITIONS.

32. **Court reporter.**—In many states it is required that a court reporter be present during the entire progress of the trial and report, in detail, all that is said during the trial. In some jurisdictions the presence of a court reporter is not required by law, but the parties to the action, if they desire the case reported, are required to provide for the presence of court reporters. Where no official court reporter is employed, and the parties furnish their own reporter, the preparation and certifying of a bill of exceptions becomes a matter of more concern to the parties and greater care is required in order that a correct transcript of the proceedings be presented to the judge for his certification.

33. **The right to open and close.**—The question as to which side shall open and close is one which must be determined before any evidence has been received, and before counsel has addressed the jury. It is not always easy to ascertain which party is entitled to this advantage. Hence in many jurisdictions the determination of the question lies

wholly within the discretion of the judge. In general, however, the party which asserts the affirmative of an issue has the opening and closing, for the reason that upon him rests the burden of making out a prima facie case. It is sometimes said that the party is entitled to the opening and closing which would prevail, under the issues joined by the pleadings, if no evidence was heard. Wherever the plaintiff is required to offer any evidence whatever to make out his prima facie case he is entitled to the opening and closing and that right cannot be granted to the defendant unless he admits the whole of the plaintiff's claim, and assumes the entire burden of making out his defense. Where suit is brought upon a note, draft, or check, the plaintiff will be entitled to the opening and closing, although upon the trial his whole case is made by offering in evidence these instruments sued upon. Where a suit is brought upon such commercial paper, and the defendant admits the execution and delivery of the instruments sued upon, but pleads payment or tender, he has the right to open and close, and the same is true in actions of libel and slander, where the words spoken are not denied but the defendant pleads justification.

34. **Opening statement.**—The opening statement of counsel to the jury must not be an argument upon the law and facts involved in the case, but must be confined to a statement of the evidence which he intends to present to the jury. It is not permitted that counsel shall argue what this evidence tends to prove. It is required that the facts stated shall

e of such character that they may be susceptible
f proof. If in the opening statement by counsel
o the jury facts are stated, which in the very na-
ure of the case are not susceptible of proof, it will
e erroneous, and such error may be urged upon
court of review. The opening statements of the
arties are binding upon them, and in some juris-
ictions judgment may be entered at the close of
laintiff's opening statement, if in making the state-
nent he has failed to state a cause of action. Usu-
lly, however, counsel in making opening statements
re not held to such a strict rule, and may be al-
owed to add to the statements, or to introduce evi-
ence of matters not contained in them. Counsel in
aking his opening address may state the principles
f law applicable to the facts, as he proposes to
rove them, but will not be permitted to argue the
aw or to give his opinion thereon. The opening
tatement of the plaintiff is usually followed by an
pening statement by counsel for the defendant,
herein he is permitted to state the facts upon
hich he bases his defense and the law applicable
o such facts. It often occurs that the defendant in
rder not to reveal the whole of his defense to his
dversary, requests the court to be permitted to re-
erve his statement until the plaintiff has closed his
ase upon the evidence. This request lies within the
iscretion of the trial court and is often granted,
ut it is not error for the court to refuse such re-
uest.

35. **Swearing witnesses.**—There is no uniform-
ty in the methods of swearing witnesses. In many

courts it is the practice to call all the witnesses to the bar of the court, before any evidence is received, and have the oath administered to them in a body. The practice in others is to swear each witness separately as he takes his place upon the witness stand. The latter method has met with the greatest approval, by reason of the fact that the oath administered under such circumstances is more likely to impress the witness with the responsibility of his situation. In many jurisdictions the most difficulty arises when some of the witnesses speak a foreign tongue, and in order to administer the oath to them an interpreter must be used. No particular form of oath has been prescribed for witnesses in most of the states, but the oath administered in the several jurisdictions does not vary in any essential degree.

36. **Excluding witnesses.**—It is a common practice for counsel on either side to request the court to enter an order excluding all witnesses, except the parties, from the court room until such time as they may be called. It is sometimes required that the witnesses so excluded, shall be separated and not be permitted after they have reached the court to talk or confer with each other. The usual rule does not go to that extent, but merely requires that witnesses who are waiting to be called shall not be permitted to hear the testimony of the one upon the witness stand. The granting or refusing of the request for the exclusion of witnesses lies within the discretion of the court, and while an order for the exclusion of witnesses may be granted, the court may except from that order certain witnesses whom it may be

desired by one or the other of the parties, to have present with them in court to assist in the examination of witnesses, and the conduct of the trial. Usually the rule excluding witnesses does not extend to witnesses in rebuttal only. Where a rule has been made excluding witnesses, and some of them violate the rule, by appearing in court and listening to the testimony given from the witness stand, the court may refuse to permit such witnesses to testify, or if, in the judgment of the court, their presence in the court was through some mistake or misunderstanding, and no harm was done to the opposing party, the court may permit or refuse to permit them to testify. The application for the exclusion of witnesses must be made before any evidence has been heard, and a motion of exclusion will not be heard after any part of the evidence has been introduced.

37. **Depositions—Written interrogatories.**—Depositions may be taken in substantially all forms of civil actions, and the laws governing their taking are altogether statutory. No original right to take depositions, except in equity proceedings, exists outside of the statutes. Such depositions are usually taken for the purpose of perpetuating the testimony of witnesses, or for obtaining and preserving the testimony of witnesses who either reside beyond the jurisdiction of the court, are about to leave the jurisdiction of the court, or who, by reason of their physical disability, are unable to attend the sessions of the court. There are two general methods of taking depositions—one, upon writ-

ten and the other upon oral interrogatories. In both cases it is of the utmost importance that the statute governing the taking of such testimony be strictly followed. If it is desired to take the depositions upon written interrogatories notice must be previously given to the opposing party of the application for a commission to take such deposition. It is also required that the interrogatories which are to be asked of the witnesses be filed with the clerk of the court at the time such notice is given. If the party receiving the notice desires to object to the taking of the depositions, or to the form or substance of the interrogatories, he is required within the time prescribed by the statute to make and file his objections in writing. If he desires to file cross-interrogatories he must do so within the time granted. The issuing of the commission, while in some cases resting wholly within the discretion of the court, is usually a matter of course, and the objections, if any, that are urged by the opposing party, are preserved for a motion to suppress, after the depositions have been taken. It is usual to have the commission issued to some judge, magistrate, or notary public, but the parties may, by stipulation, agree upon some person who holds no official title to take such deposition. If the form of the written interrogatory is not objected to before the commission is issued no objection for that reason can be urged thereafter, but objections as to competency, relevancy, or materiality may be made at the trial.

38. **Depositions — Oral interrogatories.** — The most frequent method of taking depositions is upon

oral interrogatories. It is always requisite before such depositions are taken that the particular notice prescribed by the statute be given, and that the deposition be taken at the time and place designated in the notice. The commissioner, however, has the power, for good cause shown, to continue the taking of such depositions from day to day. If both parties are represented by counsel, at the taking of such depositions, all objections to the form of the questions are waived, unless made at the examination. If, however, such objections are made at the taking of the depositions they will be reserved until the hearing of the matter before the court upon a motion to suppress or upon the trial of the cause. It will often lie within the discretion of the court to sustain or overrule such objections even though the interrogatories be leading in form. If upon the examination of a witness before the commissioner irrelevant, incompetent, and immaterial evidence is offered, and no objection is made at the time, objection to such testimony may be later urged upon a motion to suppress or upon the trial of the cause. When the testimony has been concluded before the commissioner it is his duty to cause the witness or witnesses to sign and swear to such depositions and then to properly certify the same under his official seal and forward them to the clerk of the court in which such depositions are to be used. If, after the opening of such depositions the opposing party desires to object to them, either because they have not been properly taken or certified, or for any other reason which, if the objection was sustained,

would result in the depositions being suppressed, a motion to suppress must be promptly made in order to give opportunity to retake the depositions, if such course becomes necessary. If prompt action is not taken, such objections will be waived. The commissioner generally has no power to rule upon objections made to evidence offered, but must note such objections at the time they are offered, in order that they may be heard by the judge trying the case.

CHAPTER VI.

EXAMINATION OF WITNESSES—NON-SUIT—DIRECTED VERDICT.

39. **What plaintiff must prove.**—If the action is local it is necessary that venue be proven in civil actions. If the action is transitory it may be brought either where the cause of action arose, or where the defendant is, and it is not necessary to prove venue. All actions involving an injury to land must be brought in the county or district where the land is situated, and it is necessary to prove that the land is located in such county or district, while actions for personal injury or for the recovery of money in assumpsit are transitory, and may be brought in any jurisdiction where the plaintiff or defendant may reside or where neither of them may reside, providing only that the defendant is served with process in the county or district in which the action is brought. Plaintiff must also prove every material allegation set forth in his declaration or statement of claim, unless under the statute or rules of court, governing the practice, all allegations of fact made by the plaintiff and not specifically denied by the defendant are admitted of record. In jurisdictions where no pleadings are required, nothing is admitted by the defendant and the burden of proving everything necessary to make out a case rests upon the plaintiff.

40. **Examination of defendant by plaintiff.**—In many jurisdictions it is expressly provided by statute that either party to an action has the right to call the opposing party to the witness stand and examine him under oath, touching the matters in issue, and it is usually provided in such cases that the parties so examining shall not be bound by the answers of the opposite party. The effect of the latter provision is to permit the party examining, if he desires, to offer other testimony which might impeach, or tend to impeach, the testimony of his adversary. In most cases where this rule has been adopted it has been held that when one party is called for cross-examination by his opponent, the party thus cross-examined will not be permitted at the close of such cross-examination upon his own motion to go into other matters, but must reserve whatever testimony he desires to offer until his side of the case is heard. Under this rule officers of corporations, plaintiff or defendant, may generally be called by the opposing party and cross-examined.

41. **Examination of witnesses.**—There is no fixed rule in reference to the order in which witnesses for either party may be called, and the parties are usually permitted to determine for themselves in what order their testimony shall be offered. In some instances, the court in the exercise of a sound discretion may require certain proof to be offered before certain other proof is received. Nor is there a fixed rule as to the number of witnesses each party may call to prove an issue, the parties being permitted generally to offer within reasonable bounds

as much cumulative evidence as they desire. It has, however, been frequently held by courts of review, that the court may in its discretion limit the number of witnesses that may be called to prove a particular issue. Where such discretion is exercised it must be to place the same restriction upon both parties. The testimony of witnesses who are incompetent under the statute may be received, if no objection is offered.

42. **Cross-examination.**—The right of cross-examination by either party of his adversary's witnesses is one which cannot be denied and which can only be abridged by the exercise of a sound discretion on the part of the judge. The cross-examination of a witness must be confined to the subjects covered in the direct examination. A cross-examination which unnecessarily prolongs the trial, or which travels beyond the direct examination, may be restrained by the court. Neither party is permitted to cross-examine his own witness, but, if the witness is hostile, a wider latitude in examination is permitted than would otherwise be allowed.

43. **Voluntary non-suit.**—If the plaintiff, either before he enters upon the trial or at any time during the progress of the trial, concludes that for any reason he desires to proceed no further, he may move for a non-suit, and in most jurisdictions the court has no discretion, but must grant the motion unless a set-off has been filed. It frequently arises that by reason of the absence of witnesses, or a failure on the part of the plaintiff to obtain certain proof, which he had expected to secure, he finds himself

in a position where he is either unable to make out his case, or the case made out is of such a character as renders him unwilling to submit it to a jury. Under such circumstances he has the right to ask for a non-suit. If the case is being tried by the court without a jury the plaintiff may move for a voluntary non-suit up to the time when the cause has been submitted to the court for decision. If the case is tried by a jury it is generally the law that the plaintiff retains his right to a voluntary non-suit until the jury has left the jury box. If the defendant has filed a set-off the plaintiff will not be entitled to a voluntary non-suit, but the court may in its discretion grant the non-suit.

44. **Involuntary non-suit.**—An involuntary non-suit usually arises in cases where the plaintiff has failed to take some step in the proceeding, within the time required by law, as the filing of a declaration or other pleading, or where the plaintiff fails to appear upon the call of a case for trial. It often arises because of a misjoinder or non-joinder of parties.

Where an involuntary non-suit has occurred additional time is usually granted to the plaintiff in which to file a new suit, although the statute of limitations may have run. It is important if the plaintiff finds himself unable to make the necessary proof to sustain his cause of action, and the statute of limitations has run, instead of asking the court for a non-suit, he should secure an involuntary non-suit by allowing his cause to be dismissed for want of prosecution.

45. **Motion to direct verdict.**—When all of the evidence of the plaintiff has been received, the defendant, if he thinks a case has not been made out, may move the court to direct a verdict in his behalf. Such motion operates as a demurrer to the evidence. Upon the hearing of it the court is required to determine whether or not, taken altogether, the plaintiff's evidence proves or tends to prove his claim. Upon this motion the evidence and every reasonable inference that may be drawn from the evidence must be taken as true. Nor can the court consider the credibility of the witnesses. If this motion is granted, it is the usual practice for the court to direct the jury to sign a written verdict for defendant.

The jury has no discretion in the matter, and will not be permitted to retire to the jury room to consider the evidence. The refusal of a juror to sign the verdict may be punished as a contempt of court. The right of the court to direct verdicts in this manner is not an infringement upon the right of trial by jury, for the reason that the only question involved upon such a motion is a question of law and not one of fact, and juries in civil cases are allowed to pass upon questions of fact only. At the close of all the evidence offered by either side the plaintiff may make a motion to direct a verdict in his behalf, if he thinks the evidence of the defense does not sustain his plea. The court is, upon this motion, required to determine whether or not the evidence offered on behalf of the defense is in law a defense to the plaintiff's case. The same presumptions are indulged on this motion in behalf of the defendant

as were allowed on behalf of the plaintiff's evidence. Defendant's evidence and every reasonable inference therefrom must be taken as true. If this motion is allowed the court may direct the jury to find a verdict for the plaintiff, and it has no discretion in the matter, but must obey. If, at the close of plaintiff's evidence or at the close of the whole case, the motions to direct verdicts have been overruled, and the parties making the same desire to preserve an exception for review in a court of appeal, it is necessary, in most jurisdictions, that written instructions, directing such verdict, be presented to the judge, and the judge shall mark the same refused. It will not be sufficient to hand such instructions to the judge at the time other proposed instructions are offered.

46. **Objections and exceptions.**—If either party desires to preserve for review the rulings of the court upon receiving or rejecting evidence, it is necessary, in all jurisdictions, that objections be made at the time such evidence is offered, and the judge be called upon at the time to rule upon such objections. An exception to the rulings of the court should be taken immediately after the court has made an adverse decision. It is now the rule in many courts that no exceptions are required to be taken after the court has ruled, but that exceptions will be allowed upon the record. An objection which is not followed up by a ruling of the court will not avail the objector, but on review will be considered as having been waived. If either party objects to the argument of opposing counsel, it is necessary, in

order to preserve an exception, that the court rule upon such objection. A mere objection without such ruling will be of no avail.

The purpose of preserving exceptions is to make it manifest to the reviewing court that the trial court had ample opportunity to correct the alleged error. Exceptions ought to be taken, not only to the evidence admitted, but also to the adverse decisions as to all motions and other rulings by the court.

CHAPTER VII.

CHARGING THE JURY—VERDICTS.

47. **Submission of instructions.**—In many state courts the law requires that instructions to juries must be in writing, and must be confined wholly to questions of law. In eight or ten states it is optional with the judge to instruct the juries orally or in writing. The methods of preparing and giving written instructions differ in the several jurisdictions. In some states the whole procedure is governed by statute. In others the particular method is prescribed by rules of court. Where written instructions alone may be given it is usual for counsel on both sides to prepare the instructions beforehand and to present them to the court immediately upon the close of the evidence. The judge is then required to examine all such instructions submitted and to mark them "given" or "refused." The party whose proposed instructions are refused is allowed an exception, and the question of whether such instruction should or should not have been given, is open for review, while the defeated party in any trial, by a jury, is allowed an exception to each instruction of his opponent marked "given," and read to the jury. In some jurisdictions it is required by rule that before the final argument to the jury is made, the instructions shall be settled. This is usually done by each party, out of the presence of

the jury, offering to the court the instructions which he desires read to the jury, and the judge thereupon calling upon the opposite party to present such objections as he may have to the giving of such instructions. If no objections are offered the party failing to object will be estopped from afterwards urging error upon the same. It is required that in presenting instructions to the court they should be offered as a series, should be clear, definite and concise, and shall not be contradictory of each other.

48. **Argument to the jury.**—The party upon whom rests the burden of proving the issue, has usually the opening and closing of the argument to the jury. The right to argue a case to the jury is absolute, and a denial of such right is error. Whoever opens the argument to the jury is required to argue all questions upon which he relies for a recovery and he will not be permitted to refer in his closing argument to questions not discussed in his opening. He may, however, waive the opening argument. If, having waived his opening argument, his opponent also waives argument, he will not be permitted to make a closing argument. In the argument to the jury, it is permitted that the pleadings in the cause, or such part as counsel desires to bring particularly to the attention of the jury, be read. It is not allowed, however, in civil actions, that law books be read to the jury. The time allotted to make an argument rests within the sound discretion of the judge, and his decision will not be reviewed unless it has been abused. A reasonable latitude is permitted counsel to review the evidence in the cause,

but reference to evidence that has been stricken out of the record, or to matters concerning which there is no evidence in the record, is erroneous; and an argument intended to inflame the passions and prejudices of the jurors is ground for reversal.

49. **Charging the jury.**—There are two general methods of charging jurors, either by the judge reading to the jury certain instructions which have been prepared by himself or by counsel on opposing sides, or by instructing them orally. There is a lack of uniformity on this subject in the several jurisdictions. Originally the judge in instructing juries had the right to charge them concerning the law applicable to the issues in the case, and to express an opinion upon the weight of the evidence and what such evidence tended to prove. Gradually by statutory enactment judges have been limited to giving instructions upon questions of law only, and are not generally permitted to express an opinion upon the weight of the evidence or whether or not it tends to prove the issues in the case. Where instructions are given orally counsel usually have the right to present in writing suggestions to the court in the form of requests to instruct the jury upon certain specified subjects. The judge is at liberty to accept or refuse such suggestions, and no error is allowed because of the refusal of the judge to give such instructions. In charging juries orally, the judge has always the power to sum up the evidence, but he has generally no right to express an opinion upon its weight or upon the credibility of witnesses. Whatever the instructions given by the court, they must

be based upon the evidence and must be confined to a statement of the law applicable to the case. If the court in summing up the evidence makes a misstatement thereof, exception may be taken thereto, and usually must be taken, if at all, before the jury has retired from the box. It is the rule in the federal courts that a defeated party, in order to preserve an exception to an error committed by the judge in giving oral instructions, must make objections immediately at the close of the judge's charge, and before the jury has retired from the box. If objections are not then made they will have been waived.

50. **Deliberation of the jury.**—Immediately after receiving the charge of the court, the jury is placed in the hands of an officer of the court, and taken to a room for its deliberations. It is usually held erroneous to permit the jury to separate after leaving the jury box before it has reached a verdict. It is proper for the jury, after having arrived at its verdict, to seal it, and separate until the reassembling of court on the following day or at some subsequent time. While it is the practice not to permit jurors to separate during their deliberation, yet to permit it will not always be held reversible error. It is improper during the deliberation of the jury for anyone to enter the jury room and converse with the jurors other than the officer in charge, and he may do so only to the extent necessary to properly perform his official duties. The presiding judge may not enter the jury room and talk with the jurors on any matter relating to the trial. He may give additional instructions to the jury, but this should

be done in the presence of opposing counsel. Jurors are required in nearly all civil actions to pass only upon questions of fact, and must base their verdict upon the evidence in the cause. It is usual to permit the pleadings in an action to go to the jury, together with all documentary evidence introduced in the cause. Usually the instructions when in writing may also be taken to the jury room. It is never permissible in civil actions to read law books to the jury, either during the argument or while the jurors are deliberating upon their verdict.

51. **Verdict.**—Usually no particular forms of verdicts are prescribed by statute. The forms used are generally prepared by the clerk of the court. Any form may be used which makes it possible for the jury to readily express its intention in the simplest way. Originally all verdicts were delivered orally in open court, but gradually the practice was changed so that now in most jurisdictions the verdicts are in writing, signed by the jurors. It is not error, however, in courts of record, for the judge to receive the verdict pronounced orally in open court by the foreman of the jury. Where written verdicts are required it is not absolutely necessary that they be signed by the jurors, although such practice has been generally adopted. The verdict of the jury must express the deliberate judgment of the members of the jury acting collectively. A verdict that is arrived at by chance, collusion or duress will be set aside.

52. **Reception of verdict.**—Verdicts must be received in open court, unless an express agreement

has been entered into between the parties that they may be received otherwise. The court has the power to direct the jury to sign and seal the verdict, then separate, and at a later time present such verdict in open court. Unless an express stipulation has been made between the parties the court has no right to discharge the jury after it has reached a verdict without first having such verdict presented in open court. The defeated party always has the right to poll the jury. By polling the jury is meant to ask of each juror separately, in open court, whether or not the verdict returned was, and is, his verdict. In some jurisdictions the right to poll the jury lies wholly within the discretion of the trial court. Where such right is reserved to the parties it may be waived by the stipulation of the parties, allowing the verdict to be signed, sealed and delivered in open court on the following day after the jury has separated. When a jury has once separated after sealing its verdict, it will not be proper, at a later date, to permit counsel to poll the jury. A verdict returned by a jury is of no binding force until it has been received and recorded. If, in polling the jury, a juror answers that the verdict returned is not his verdict, the verdict cannot be received and recorded.

53. **Amendment of verdict.**—It is the duty of the court when verdicts are returned to see that they are put in proper form. This may be done either in the presence of the jury or after the jury has been discharged. No amendment, however, by the court, out of the presence of the jury, can be made except

as to form. The court, however, before the jury has been allowed to separate, may ask the jurors to again retire to further consider their verdict, and to change it either in matter of form or substance. If the jury has been permitted to separate, after finding its verdict, it may be directed by the court to reassemble and amend its verdict as to form only. After a verdict has been received and recorded, and the jury permitted to separate, no juryman will be allowed to impeach his verdict for any cause whatever. Verdicts may be impeached, after they have been recorded, and the jury permitted to separate, because of improper conduct on the part of the jurors, or because of the illegal manner in which the verdict was arrived at. Where the amount of the verdict is in excess of that claimed by the plaintiff such error may be cured by a remittitur entered of record upon the motion of the plaintiff. Any motion by either party to correct a verdict as to form or substance must be made at the earliest opportunity; if as to substance, before the jury has been allowed to separate; if as to form, it should be made during the term at which the verdict was rendered.

CHAPTER VIII.

ENTERING JUDGMENT.

54. **Motion for new trial.**—After the verdict has been received and recorded, the defeated party may at once move for a new trial, and such motion will be entered of record. Usually argument upon the motion is reserved to give the parties an opportunity to properly present the ground urged in such motion. In most jurisdictions it is required that a motion for a new trial be in writing, and filed in the cause during the term of court at which the verdict is rendered. Upon the argument of this motion counsel for the defeated party may urge every error which in his judgment was committed against the interest of his client, during the progress of the trial. This usually embraces errors committed in the reception and rejection of evidence, or in the giving or refusing of instructions. If the motion is allowed the cause is generally placed upon the trial calendar to be retried when reached in its order. If it is denied, and the defeated party desires to preserve for review any error that is apparent upon the face of the record, he may then make a motion in arrest of judgment, and except to the ruling of the court in denying such motion.

55. **Arrest of judgment.**—A motion in arrest of judgment can only be urged where the error complained of is apparent upon the face of the record.

The judgment in civil matters will never be arrested because of an error in the mere form of the proceedings, but the error must be in a matter of substance, such as misjoinder of parties, or where the verdict is not responsive to the issues in the case, or where the pleadings of the successful party will not sustain the verdict of the jury, or where the successful party has failed to establish his allegations.

56. **Judgment on the verdict.**—When the court has overruled a motion in arrest of judgment nothing remains to be done except to enter the judgment of record in the cause. Unless there is an express statutory provision the successful party cannot divide his cause of action. He can have but one judgment upon a verdict. In entering a judgment of record no precise words are required to be used, but it is always requisite that the judgment entered shall be definite and certain, both as to the parties and as to the amount. It was formerly required that judgments must be entered at the same term at which verdicts were rendered, but such is not now the practice. A judgment may be rendered at a term subsequent to the verdict and the court may retain jurisdiction of the cause, by a motion to continue from one term to the next, or a judgment may be entered nunc pro tunc as of a previous date. In nearly all jurisdictions where the common law prevails certain general forms are used in the entry of judgments. In some jurisdictions, however, these forms have been greatly abbreviated, the courts there holding, as in Illinois, that the words and phrases contained in a judgment order may be abbreviated

so long as the meaning of the abbreviated order is apparent and intelligible to the lay-reader.

57. **Prayer for appeal.**—When a judgment has been entered, an execution may be issued at once, and levy made upon any property found belonging to the judgment debtor. In order to stay the issuance of such an execution, it is necessary that the defeated party, if he desires to have the judgment reviewed in a court of appeal, shall at once make a motion before the trial judge, for an appeal. In many jurisdictions the right of appeal is unlimited; in some an appeal is granted only in certain kinds of action; in others the right of appeal is governed by the amount of the judgment involved. In some states there are two courts of appeal, one usually known as an appellate court, the other as a supreme court. Usually where two courts of appeal exist the supreme court has jurisdiction to review errors of law only in the cases that pass through the appellate court, but has jurisdiction to pass upon both questions of law and fact, in cases that are appealed directly from the trial, to the supreme court. Generally in common law actions, it is required that where there are two appellate courts an appeal must be taken first to the inferior tribunal and a further appeal is allowed from that court only where the amount involved exceeds a certain sum. In praying an appeal from the judgment of the trial court, it is necessary that it be taken to the first court that has jurisdiction to review the cause. Where the right of appeal is unlimited the trial court immediately grants such motion, upon condition that the party so

appealing shall prepare and file a bill of exceptions in the cause and shall give bond within a fixed time. In many jurisdictions the defeated party has the option to appeal his cause or to seek a review by a writ of error. If he is unable to give the required bond, or for some reason does not desire to give such bond, he will pursue the latter remedy. In such case his adversary may have an execution issued pending such appeal and a levy made upon any property of the debtor that may be found.

58. **Writ of error.**—If instead of appealing from the judgment of the trial court, the defeated party desires to have his cause reviewed by a writ of error he will still be required to prepare and file his bill of exceptions in the same manner as if his cause was to be reviewed by appeal. A writ of error is a new suit and is instituted by the defeated party filing his application for a writ of error with the clerk of the court of appeal. In nearly all jurisdictions such writ is issued by the clerk as a matter of course, and when served upon the successful party below, operates as a notice to him that the cause is pending in the appellate court, and he is required thereafter to take such steps in the matter as he desires. When such writ of error has been sued out of the court of appeal and filed in the trial court, that court is required to prepare a record of the proceedings had therein, including the bill of exceptions, which record, when so prepared and certified, is filed in the court of appeal, and the action then proceeds in such court as a new suit. If, pending the hearing upon the writ of error, it is desired that execution be

stayed upon the judgment below, the judgment debtor may apply to the appellate court, or one of the judges thereof, for a supersedeas to stay such execution.

59. **Supersedeas.**—When it is desired to stay execution upon a judgment pending the hearing upon a writ of error, the judgment debtor must apply to the appellate court or to one of the judges of such court, for an order staying all further proceedings in the court below until the cause has been decided by the court of review. If that court, or the judge who hears the motion, is of the opinion that the questions raised upon the record are of such a character that the court upon a review of the whole cause, might vacate and set aside the judgment, it will usually direct that a supersedeas be issued, the supersedeas being merely an order, directing the trial court to stay further proceedings. A supersedeas is usually allowed upon the condition that a bond be given, requiring the payment of the judgment, or in some instances, the payment of the costs involved, in the event that judgment is affirmed in the court of appeal. In some jurisdictions the denial of a supersedeas operates as an affirmance of the judgment.

CHAPTER IX.

APPEALS.

60. **Who may appeal.**—Under the common law, there was no absolute right of appeal in civil common law actions. The legislatures of the several states have the power to determine what appeals, if any, shall be allowed, and the nature and extent of the jurisdiction of courts of appeal. It is a well established principle that no one will be allowed to appeal, or prosecute a writ of error, unless he is a party to the action below or is afterwards made such by an order of the court, or unless in some way his interest in the outcome of the litigation appears from the record. It follows that a person who is merely a nominal party to an action, and has no interest therein, cannot appeal. It is also essential to a right of appeal, that the party appealing should in some way be aggrieved by the judgment complained of. A party cannot appeal from a judgment in his favor, unless he can show that he has been injured by such judgment. One who is merely a judgment creditor of a party to an action has not, by reason of this fact alone, the right to appeal. If, however, as a creditor he has been made a party to the action he may appeal. The right to appeal may be waived by express stipulation of the parties. In order that such a stipulation shall operate as a waiver of the right to appeal, it must expressly waive

that right. If judgment has been entered by consent of all the parties interested, no appeal may be prosecuted from such judgment. If the judgment has been paid in order to protect the judgment debtor from serious consequences resulting from an execution levy upon his property, such judgment debtor may have a right of appeal. If, however, the judgment has been voluntarily paid, and no legal duress has been practiced, the party so paying it waives his right of appeal.

61. **When appeal must be taken.**—The statutes governing appeals usually fix the time in which a prayer for an appeal must be made. In nearly all instances such appeal must be prayed during the term at which the judgment was entered. A writ of error, however, may be sued out after the expiration of the term, and in many jurisdictions, during any time within five years after the rendering of such judgment. If it is desired to have an appellate court review alleged errors occurring upon the trial of the cause it is necessary, in prosecuting a writ of error, to have the bill of exceptions prepared and filed within the time fixed by the court, usually a certain number of days after the entry of judgment. This time may be extended, but generally a motion for an extension of time must be made before the original time granted by the court has expired.

62. **Effect of an appeal upon the judgment.**—A prayer for an appeal does not stay further proceedings in the trial court upon the judgment. Appeals are generally allowed on condition that a bond is given within a certain time, conditioned upon the

payment of the judgment, or upon the performance of some other act; and until such bond has been executed, approved and filed, in the cause, the judgment of the trial court remains in full force and effect, and execution may issue thereon. When appellant has executed the required bond and the same has been approved and filed in the cause, all further action upon the judgment is stayed and jurisdiction of the cause is transferred to the court of appeal. During the pendency of such appeal the trial court has no power to enter any further judgment, order or decree in the cause which would affect the rights of the parties. An error, however, in the form of the judgment or in the manner of certifying the record of the trial court may be corrected at any time. If an execution has been issued and a levy made upon the property of the debtor before the appeal bond has been approved, such levy will be released and the execution returned not satisfied.

63. **Effect of issuing writ of error.**—The issuing of a writ of error by a court of appeal does not affect the judgment or stay further proceedings in the trial court. It is merely a direction to that court to send up the record of the proceedings had in the cause, that certain alleged errors may be reviewed. If it is desired that all matters pertaining to the prosecution of the judgment shall remain in statu quo during the pendency of the cause in the court of appeal, plaintiff in error must secure from the appellate court a writ of supersedeas, by giving a bond usually conditioned upon the payment of the judgment to be reviewed. In order to secure a super-

supersedeas, courts of appeal generally have provided that the record, or a portion of it, be filed in the appellate court, and that the same be abstracted and presented to them in such form that the alleged errors may be readily perceived. The denial of a writ of supersedeas leaves the judgment of the trial court in full force and effect, and the successful party below may proceed to levy an execution upon any property he may find belonging to the judgment debtor.

64. **Bill of exceptions.**—A bill of exceptions is usually required to contain all the evidence offered or received upon the trial of the cause, including all objections urged by either party and the rulings of the court thereon, all instructions offered by either party, whether given or refused, and the action of the court in regard thereto. In many jurisdictions this bill of exceptions is prepared by an official court stenographer, whose report of the proceedings is generally accepted by court and counsel as being correct. In many other jurisdictions no provision is made for an official court stenographer and the parties to the action are required, if they desire the evidence preserved, to employ their own stenographers, and within a reasonable time allowed by the court, to present a transcript of the evidence, together with the rulings of the court thereupon. Where a difference arises between the parties as to what actually occurred upon the trial of the cause, when no official stenographer was present, the judge is usually left to his recollection, or to such memoranda as he has, to determine what did occur. In some jurisdictions the statutes specifically fix the

time within which a bill of exceptions may be filed. In others that time is fixed by the court at the time judgment is entered. It is always required that the bill of exceptions be filed within the time prescribed or within such further time as the court may have granted.

65. **Preparing and filing record.**—The duty of preparing the record of the trial court rests upon the clerk of that court. In most jurisdictions the statutes prescribe what the record shall contain, and it is necessary that the direction of the statute be specifically followed. It is usually made up of all pleadings filed and all orders entered in the cause, together with the bill of exceptions. When it is prepared and certified by the clerk as being the complete record of the cause, it is filed in the court of appeal, and if, after it has been filed, it is desired to amend the same, a motion to make such amendment must be made in the court of appeal. If either party desires to present to the court of appeal some parts of the record of the trial court not contained in the original record as certified by the clerk, he may move for leave to file a supplemental record.

66. **Assignments of error.**—After the record has been filed the appellant is required to assign upon it such alleged errors as he desires to have reviewed. These assignments are usually made by writing them upon the record itself. All errors assigned and not argued or urged by appellant in his brief thereafter filed, will be waived.

A reviewing court will not consider any question not raised by an assignment of error. In order that

assignments of error may receive consideration by a court of appeal, it is requisite that they be specific. Especially is this true where assignments of error are made concerning the pleadings in the cause. A general assignment, that the court erred in its rulings upon the law, or that the verdict is contrary to the evidence and the law, will not be considered. Appellee may, if he desires, assign cross-errors and thereby raise for review certain questions which he claims were erroneously decided adversely to him.

67. **Abstracts.**—The statutes prescribe the particular methods by which abstracts shall be prepared. It is usually required that an abstract shall contain, in condensed form, the complete record of the cause. It must conform in shape and size to certain prescribed requirements. If in preparing an abstract the appealing party omits or misstates any essential part of the evidence, his opponent has the right to file an additional abstract, covering these questions, and the cost of the preparation and filing of the same will usually be assessed against appellant. The number of abstracts to be filed in the cause is fixed by statute. If the abstracts do not comply with the prescribed regulations they will be stricken from the files and the cause affirmed.

68. **Briefs.**—A brief is a printed document prepared by counsel, and is generally intended to state concisely the questions upon which a ruling of the reviewing court is desired. The brief should contain a clear and concise statement of every question raised by the appeal, and it will generally be stricken from the files if, instead of such concise statement,

it contains a review of all the evidence in the case. It is always permissible in the brief to cite, within reasonable bounds, such authorities as counsel may think applicable to the questions raised. No question, however, can be raised in the brief that was not raised in the trial court. The rules of court generally determine the form and character of the briefs. The time in which briefs are to be filed is determined by the rules. This time may be extended at the discretion of the court. Briefs of the opposing party may be filed within a fixed time, and generally appellant has the right to file a reply after the briefs of his opponent have been filed.

69. **Oral argument.**—Record, briefs and abstracts having been filed, it then remains for counsel upon either side, if he desires to orally argue the cause, to give notice of such desire to the opposing party. The right to argue the cause orally in a court of appeal is generally determined by statute, and the time allotted for such argument is fixed by rules of court. In most jurisdictions the practice prevails that when a cause has been argued by one or both of the parties, the court will take the same under advisement and either before or after the questions raised have been considered by the court as a whole, the cause will be assigned to one of the judges of the court to prepare an opinion and submit it to the court sitting in conference at a later date. If at the conference such opinion meets with the approval of the majority of the court, it becomes the opinion of the whole court, and determines the judgment of the court. If the judgment of the trial court is

affirmed, appellee may at once secure an order of affirmance from the court of appeal, and when filed in the court below, may proceed by execution upon his original judgment. If the order of the court of appeal is to remand the cause for a new trial, then upon the filing of such remanding order, in the trial court, the cause may be again set down for trial upon the calendar.

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QUIZ QUESTIONS

PRACTICE IN CIVIL ACTIONS

(*The numbers refer to the numbered sections in the text.*)

1. What is the first instrument to file in beginning a law suit and what is set forth therein?
2. Suppose that a necessary party fails to join in the suit without its being shown that such party is lawfully excused from so doing, can the suit be maintained?
3. When filing a praecipe in a case where you are in doubt as to who should be parties defendant, how will you proceed?
4. Distinguish between joint and several actions on the part of those bringing suit.
5. (a) In an action ex contractu the plaintiff fails to join all the defendants. Is this fatal? (b) What is the rule in actions ex delicto with reference to the same matter?
6. Define the writ of summons and state in what manner it should be served in order to give the court jurisdiction of the person.
7. A brings suit against B; summons issues and is returned served upon B by C, while in fact D is the sheriff of the county. How would you take advantage of this?
8. To what extent, if at all, have statutory enactments changed common law rules regarding pleadings and the burden of proof thereunder?
9. Under what circumstances may one party propound written interrogatories to the adverse party, and how may the court compel the adverse party to answer the same?
0. Defendant, upon examination, discovers that plaintiff's pleadings do not sufficiently set forth that the court has jurisdiction of the subject matter. How can this be taken advantage of by defendant?

11. Smith brings action against Jones; Jones demurs to the declaration. The demurrer is sustained and Smith is given leave to file an amended declaration within ten days. This he fails to do. You are Smith's counsel. What action will you take?
12. Suppose your client desired to take a change of venue. To what extent would you consider it necessary to examine the statutes of the state in which the action is pending?
13. Under what circumstances and in what class of cases may the courts give a more speedy hearing to the litigants than is usual in other cases?
14. A asks that his cause against B be continued on the ground that a material witness is ill; B replies that he will admit that if such witness were present he would testify to such facts as A may set up in an affidavit. A refuses to make the affidavit. Ought the cause to be continued?
15. What do you understand by rules of court and how far are they binding upon litigants?
16. A sues B in assumpsit and does not desire a trial by jury; B desires that a jury be called and refuses to consent to a trial by the court. At the conclusion of the case will there be a verdict or a finding?
17. Ought the fact that the cause is being tried before the court without the intervention of a jury, to affect the rules of evidence regarding the admissibility of testimony?
18. A case is being tried before the judge. The plaintiff desires to obtain the ruling of the judge on certain propositions of law in order to preserve his record for appeal. How may he properly proceed to do so?
19. In a trial before the court is it properly within the scope of his authority to find both as to the law and as to the facts?
20. A verdict is rendered against the defendant; time within which to move for a new trial, for arrest of judgment, or to pray an appeal has expired. Under what circumstances, if any, may defendant be heard on such motions and, if same are denied, have his case reviewed on error or appeal?
21. We speak of the finding of a court and the verdict of the jury. What is the distinction between them?
22. What is meant by trial by jury? At common law how may men constitute a lawful jury?

23. In what way or manner are the jurors selected from the general panel to try any particular cause and who determines their qualifications?

24. From what source are the names of tentative jurors secured and by what process are they brought into court?

25. A case is called for trial and the court orders a jury to come. Whose duty is it to call the names of the jurymen, to direct them to appear and await their examination?

26-27. Is the examination of jurors primarily a right of counsel or merely a privilege?

28. What is meant by challenge to the array and under what circumstances may it be exercised: (a) in civil cases; (b) in criminal cases?

29. Counsel for A in a civil suit challenges a juryman on the ground that he is a relative of B, the plaintiff. Under what circumstances will such challenge be allowed for cause, and when will it be error to refuse it?

30. Distinguish between peremptory challenges and challenges for cause.

31. When the jury has been selected, what is the next step in the proceeding to try the cause?

32. Would you favor the appointment of official court reporters? If your answer be yes, state under what circumstances.

33. In the trial of a certain case between A and B, the burden of proof rests upon B. Which has the right to open and close, A or B?

34. In making an opening statement counsel becomes argumentative and objection is made for this reason. Ought this objection to be sustained?

35-36. The plaintiff and defendant are in court, each with numerous witnesses; neither party desires that the witnesses on the opposite side hear the witnesses testifying on his side. Can this be prevented, and if so, in what manner?

37. What is a deposition? State its object and effect and under what circumstances it may be read in evidence.

38. In preparing a case for trial you discover that it will be impossible for you, by legal process or otherwise, to bring a certain material witness into court. What will you do in order to secure the testimony of such witness, either upon oral or written interrogatories?

39. Distinguish between local and transitory actions at common law and state wherein this distinction has any bearing upon the question of venue.
40. May one party call and examine the opposing party as a witness, and if so, when?
41. A case is called and both parties declare themselves ready for trial. Which party should first present his evidence?
42. Define the proper limits of cross-examination.
43-44. What is a non-suit? Distinguish between a voluntary and an involuntary non-suit, and give the general rules of law governing each.
45. If plaintiff fails to establish his cause of action, or defendant his ground of defense, what will you ask the court to do if you represent the plaintiff? What will you do under like circumstances, if you represent the defendant?
46. Distinguish between an objection and an exception, and state the purpose of preserving exceptions in the record.
47. In what manner should the court proceed to instruct the jury on the questions of law as applicable to the facts of the case?
48. Counsel for plaintiff desires to argue the case to the jury, but the court refuses to permit him so to do. Is this error and under what circumstances may it be considered reversible error?
49. At what stage of the proceedings should the court give to the jury the law governing the case?
50. After the court has charged the jury on the matters of law, what is the next step in the proceedings?
51. What is a verdict? How should it be returned into court?
52. When the verdict is correct in form, what order should the court direct the clerk to enter to the end that the verdict may become a part of the record?
53. Suppose the verdict is informal, what would be the duty of the court upon his attention being called to that fact?
54. (a) If you represented the party against whom the verdict was returned, what would you do in order to preserve the rights of your client? (b) What is the purpose of a motion for a new trial and should it direct the attention of the court to all of the alleged errors?
55. Your motion for a new trial is denied. What can you incor-

porate and take advantage of in a motion in arrest of judgment?

56. Distinguish between a verdict and a judgment and state what is necessary to be done in order to merge the verdict into a judgment.

57. The court having entered judgment against your client, what can you do to obtain a review of the cause in the higher courts, and how can you prevent the successful party from immediately obtaining execution upon the judgment?

58. Distinguish between an appeal and a writ of error, and state under what circumstances each is the proper proceeding.

59. In a case where your client must sue out a writ of error, but desires to stay the execution, pending the final determination of the cause, what remedy has he and what is necessary to secure his rights?

60. Is the right to appeal or sue out a writ of error conferred by common law or by statute, and who may exercise such right?

61. If you desire to appeal or sue out a writ of error, how will you ascertain the time within which you can do so?

62-63. You represent the successful party. The defeated party prays an appeal, but does not perfect the same. He then sues out a writ of error, but does not have it made a supersedeas. Does this affect your right to have execution?

64. What is the office of a bill of exceptions and what should it contain?

65. After your bill of exceptions has been settled and filed with the clerk, you desire the record to be made up. What paper must you file with the clerk?

66. What are the object and purpose of the assignments of error and what should be set forth therein?

67. Your opponent files his abstract of the record; it is incomplete. What will you do?

68. What is a brief and what should it properly contain?

69. Under what circumstances is oral argument in the reviewing court permissible?

PART III

EQUITY PLEADING

BY

WILLIAM EDWARD HIGGINS, B.S., LL.B.*

CHAPTER I.

INTRODUCTION.

A. Fundamentals of Pleading.

1. **Courts.**—Pleading will be much more readily learned if the beginner first understands the nature and function of a court. This may be defined as the agency of the sovereign, established to hear and to determine such controversies as are delegated to that agency for that purpose. Anciently, the sovereign was an individual who, among other duties, assumed to be the "fountain of law and justice." Later, this duty was, by him as sovereign, delegated to subordinates operating under different official names. But it is not to be understood that, historically, this was at all times a conscious and voluntary act upon his part; for the courts, as we now know them, are an evolution, a court of equity having developed historically as sketched in a later section of this article.

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2. **Jurisdiction of a court.**—An agent has no more power than is given to him by his principal, which, in the case of a court in this country, is the state as the sovereign. It therefore follows that a court can hear and determine only such matters as are delegated to it.[1]

This power to hear and to determine certain designated matters is termed the jurisdiction of the court, and the matters thus assigned are those which have arisen between such persons as the sovereign permits to come before this agency.

3. **Equity jurisdiction.**—All of these agencies do not have the same duties to perform, differing in this matter just as do the agents and servants of any principal having a large amount of business which he must delegate to subordinates for action. Hence, there are courts with the duty to hear and to determine different kinds of controversies, involving different kinds of questions. Courts of common law adjudged such controversies as were recognized at common law; courts of equity, those which were not cognizable at common law, but which courts of equity recognized as coming within their jurisdiction. Owing to the historical fact that the common law courts first obtained jurisdiction over a large number of questions and relationships, which might be involved in a controversy, with power to afford relief, and, owing to the further fact, that

[1] Courts are impersonal, and consist of (1) a presiding and adjudging officer styled "the court," while so acting; (2) parties litigating; (3) a jury (sometimes); (4) witnesses; (5) attorneys; and (6) ministerial officers, such as a clerk and a sheriff or marshal. The individual who acts as "the court," when actually presiding, is also styled "the judge."

access to the equity court was granted only when it appeared that there was no adequate remedy offered by the courts of common law, an equity court will not now hear and determine a controversy which properly belongs to a court of common law. The complaining person must go to the proper agency of the state, the common law court, with his grievance. Hence the necessity of understanding the questions, rights, and relationships over which equity courts will take jurisdiction, for if the claim of the complaining party is one that the common law court recognizes and for which it can afford adequate relief, a court of equity has no power to act, that is to say, it has no jurisdiction.

4. **Equity pleading defined.**—Equity pleading is the system of pleading used in the equity courts and is distinct from the systems of common law and code pleading. In this country, it is in use in fourteen different jurisdictions, which are, however, divisible into two classes, namely, those which have separate courts of law and of equity, and those in which both equity and common law cases are tried in the same court under the common law or equity system as required by the nature of the case. To the first class belong the states of Alabama, Delaware, Mississippi, New Jersey, Tennessee and Vermont. The second class includes the District of Columbia, Florida, Illinois, Maine, Massachusetts, Virginia, West Virginia and the United States. In still other states the code system is used, for a proper understanding of which a knowledge of equity pleading is highly desirable, not to say essential.

5. **Origin of equity pleading.**—The system had its origin in the pleading and procedure in use in the chancery courts of England. These courts arose under the duties and powers of the king's chancellor, to whom the king had delegated his power to grant redress in proper cases where the common law courts could give either no remedy, or even if there were one, no adequate remedy under the circumstances of the case.[2] Courts of equity, therefore, were distinct from the courts of common law to which the king had delegated authority to hear and to determine causes which arose under the common law, and equity pleading and procedure were distinct from those which prevailed in the law courts, though the pleading in equity was not uninfluenced by the latter. The early chancellors were often ecclesiastics, and many of them were well acquainted with the canon law in use in the ecclesiastical courts which heard offenses against the church. The canon law in turn was derived from or greatly influenced by the civil law of Rome. Thus it is said that the pleadings in equity were probably borrowed either from the canon law, or from the civil law, or from both.[3] The pleading and practice of the chancery courts of England were transplanted to the colonies of America and became the foundation of the present system in use in the various equity courts of this country.

6. **An equitable cause of action.**—The complaining party, styled variously "complainant," or "plaintiff," varying with the custom of different

[2] Langdell, Equity Pleading (2d ed.), § 37.
[3] Story, Equity Pleading (10th ed.), § 14.

courts, must bring into the court of equity a claim called his "grounds of suit," or by the more common name of "cause of action." If what he brings into court is not such a claim or cause of action as the court of equity can hear and determine, even though some other court, such as a common law court, may do so, then the court of equity will refuse to proceed with it, since the claim is not within its jurisdiction.

7. **Statement of the cause of action.**—In order that the court may see that the claim is one over which it has jurisdiction, a written statement is required, to get the cause before the court. This statement, also called the bill, consists of a certain kind of facts, called the "ultimate" facts,[4] because, if proven to exist, they are the final or ultimate facts from which deductions or "conclusions of law" are made, to enable the court, as an expert in law, to pronounce judgment. Some courts and text writers also term these facts the "pleadable," or "operative" facts.

8. **The issues of fact.**—If it appear from the statement of the ultimate facts that there is a cause of action in favor of the plaintiff, provided those ultimate facts are true, then either the opposite party must admit that those facts do exist, or he must deny the existence of some or of all of them. An issue over the existence of a certain fact, therefore, may be the matter in dispute, and any party wishing to rely upon a fact must assert it in such a way that an issue over its existence can be made. An

[4] New Federal Equity Rules, rule 25.

issue of fact is an issue over the existence of a particular fact or set of facts.

9. **How the facts should be stated.**—The purpose of stating the facts, therefore, is twofold: (1) To reveal a claim which the particular court of equity can hear and determine; (2) to enable the opposite party to deny the existence of the facts, if such party can truthfully do so.

It follows that the facts must be so stated that their existence can be put in issue by the opposite party; that is to say, the plaintiff, when he brings a fact into court for the purpose of aiding in the statement of a cause of action, must either affirm the existence of that fact, so that the opposite party can make an issue over its existence, or he must deny the fact so that the other party can make the issue by affirming its existence.

This requirement has given rise to two requirements of logical pleading: (1) The statements of fact must be positive; and (2) the statements must be certain.

10. **Facts must be stated positively.**—Positiveness of statement, therefore, means that the fact must be stated in affirmative or negative form, so that its existence can be denied, if affirmed, or affirmed, if denied.

The most common instances of the failure thus to state in issuable form are those of recitals, of hypothetical, and of argumentative statements. For example, if the pleader, intending to assert that A "had purchased," should say instead, A "having purchased," he would be merely reciting and not

asserting that A "had purchased," and the fact would not be stated so that the defendant could say that "A had not purchased."

Again, a statement that "if said H had left the said C before he was twenty-one years old, he did so from and upon good cause," does not assert that H "did leave C before he was twenty-one," and therefore it is not in proper form so that the opposite party can deny that "H left C before he was twenty-one."[5]

And again, the words that "the defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased by the defendant, as aforesaid, which would affect the same or any of them, or any part thereof," do not assert positively that the defendant "had no notice," but do assert that he had no notice "which would affect the same." This is argumentative in form and therefore not positive.[6] The pleader should have stated that "the defendant had no notice," and when that was denied, introduced evidence at the hearing on the issue of notice. This evidence would show what kind of notice had been given the defendant, and then it would become a matter of argument whether "the defendant had no notice whatever which would affect the same." The fact of notice in this illustration is not alleged positively but argumentatively.

11. **Facts must be stated with certainty.**—Not only should facts be stated positively but they must

[5] Le Baron v. Shepherd, 21 Mich. 263, 271.
[6] Wood v. Mann, 30 Fed. Cas. 445.

be so stated that it is clear which fact, or facts, are asserted for the purpose of having issue taken upon their existence. In other words, each ultimate fact must be identified so that the other party may know just what fact is brought into court, otherwise there can be no issue of fact. In the law of pleading, the rule is that each fact must be stated with certainty. In the illustration last above, the statement "there was no notice * * * which would affect the same," is uncertain, because the statement does not contain the fact, or facts, which "would affect the same." The court, therefore, held the statement to be uncertain.[7] Uncertainty may arise in a number of ways, but it is not necessary to multiply illustrations. It will be sufficient to say that whenever a fact, or set of facts, is stated so that the fact, or set of facts, is not fairly identified, the opposite party may complain of a lack of certainty.

12. **Strictness in pleading.**—Equity, however, does not require the statement of facts in any set form of words or in any logical order, though the courts prefer an orderly and systematic statement. But if an ultimate fact appear by necessary implication from the other facts stated, the statement will be held sufficient as against an effort of the opposite party to have an entire pleading rejected on that account, although the court might require the fact to be stated specifically were a request made for this only, and not to reject the entire pleading. Thus, when it was charged that "defendants, by adopting the name of The Investor for such paper,

[7] Wood v. Mann, 30 Fed. Cas. 445.

and by printing at the head of its editorial column the words, 'Published by The Investor Publishing Company, Incorporated,' have thereby diverted the trade belonging to the complainant," it was held that this would not cause the rejection of the entire pleading on what is termed a general demurrer, for it does, by necessary implication, assert that the defendant confused the public and thus diverted trade.[8]

13. **What need not be stated.**—The plaintiff, in stating his cause of action, or the defendant, in stating his defenses, hereafter explained, need not set out any matters of which the court is bound to take notice, or of which it is supposed to have full knowledge. These are already in court. It may be said that they automatically are before the court as an accompaniment of any set of ultimate facts with which they can be associated. Hence it is unnecessary for the parties to state (1) matters of law, (2) or legal presumption, (3) or to recite public acts or laws of the jurisdiction within which the court operates, (4) or to allege facts which the particular court is bound to know exist. This does not mean that any particular one of these is actually known to the individual judge who is acting as "the court," but merely that such matters need not be brought into court by pleading them. It will often happen that the individual who is acting as "the court" is actually ignorant of a rule of law, or of the legal presumption accompanying the facts stated, or of the existence of a public statute, or of certain facts

[8] Investor Pub. Co. v. Dobinson, 72 Fed. 603.

which are well known from history or the common experience of men. In these instances, equity procedure, as well as that at common law, permits the attention of the individual "court" to be called to the rule, or presumption, or public statute, or fact, and the matter shown to him. For example, a rule of law applicable to the facts in court is established by showing to the court (i.e., the individual) the opinion of the supreme court of some state in some case. A public statute of the jurisdiction within which the court operates is established by exhibiting the same in a copy of the statutes. But all such matters need not, and, in fact, should not, be stated in the pleading, for they only make the pleading longer and add to the expense.

14. **Impertinence.**—If the statement by which the plaintiff attempts to reveal his cause of action, or the defendant his defense, contain words or expressions which do not assist in the attempt, they are not pertinent and are, therefore, called impertinent, and under the usual practice they may be removed by an application to the court called an "exception." The exception should specifically point out the objectionable words, figures or expressions, and state the reason for the objection. Such words and expressions serve no useful purpose, tend to confuse or mislead, or to lengthen the statement, causing waste of time and money.

In the federal courts, the application is called a "motion to strike out," the "exception" having been abolished.[9]

[9] New Federal Rules, rule 21.

Such an application, however, is addressed to the discretion of the court, since the impertinence may be too trivial or may not tend actually to mislead or confuse; and, therefore, the party who appeals the case on the ground that the court refused or granted the application, must show that he was prejudiced by the ruling.

But it must be remembered that the plaintiff may state facts for various purposes, namely, to obtain discovery or to make interrogatories, and that when these various statements are placed in the first pleading of the plaintiff, called the bill, the words, figures, and expressions useful for one purpose are not impertinent because they are not necessary for the others.[10]

15. **Scandal.**—A statement of facts or expressions, which are unnecessary, and which also reflect upon the reputation or character of another, constitutes scandalous matter, which will be expunged by the court upon his own motion or upon application by the aggrieved person. Technically, all scandalous expressions are also impertinent, but the two are considered separately in equity, because, ordinarily, if the defendant has answered, the first pleading of the plaintiff cannot be referred to an officer of the court, called a master, for examination to ascertain if the expressions be impertinent, but it may be referred for scandal at any time, for such expressions are likely to do harm and make the records of the court the means of perpetuating slander.[11]

[10] Story, Equity Pleading (10th ed.), § 268.
[11] Story, Equity Pleading (10th ed.), § 270.

The application is made by an "exception" specifically pointing out the objectionable statements, and the determination thereof is referred to a master for his report. If the exception is sustained, counsel is held responsible for the contents of his pleading, and he may be ordered to pay the costs of the application to the parties aggrieved. This applies to all the pleadings, and the application may be made by one not a party to the suit, if he be aggrieved.[12]

In the federal courts the application is now made by motion to strike out.[13]

16. **Evidentiary facts not to be pleaded.**—The statement of the cause of action by means of evidentiary facts instead of ultimate facts should not be attempted for two reasons: (1) Because evidentiary facts are of such a nature that even if they were disproved after having been put in issue, the party asserting them might still be entitled to judgment in his favor; (2) because the evidence as it actually occurred makes the statement long, often involved, and confused.

An illustration of the first reason may be borrowed from common law pleading, where the rule is the same. In an action for breach of contract by failure to pay the promised amount for a horse sold and delivered, the plaintiff says: "I said to the defendant, 'Will you buy my horse for one hundred dollars, payable in one week?'" Defendant said, "Yes." If the conversation really were: Defendant said to the plaintiff, "Will you take one hundred dol-

[12] Story, Equity Pleading (10th ed.), § 47.
[13] New Federal Equity Rules, rule 21.

lars for your horse?" to which plaintiff replied, "Yes," the defendant, when sued on the statement as made by the plaintiff, could truthfully deny that conversation, thus putting the very words used in issue, and then prove the conversation as it actually did occur, showing that defendant made the offer and that plaintiff accepted, instead of the contrary. Upon the issue thus made over the existence of the evidentiary facts, the defendant would prevail, and yet both simply go to prove an offer and acceptance as a matter of law. If the plaintiff should make the statement thus: "The plaintiff sold and delivered to the defendant a horse at the agreed price of one hundred dollars," each conversation might be given in evidence by the two parties, and the plaintiff recover judgment. Hence the rule that the cause of action should be stated by means of the ultimate and not the evidentiary facts.

However, if the statement of the cause of action should contain evidentiary facts along with the necessary ultimate facts, the entire statement will not be rejected as bad, but it will be subject to attack to have the evidence stricken out of the statement as unnecessary.

But evidence will be permitted in the charging part of the bill in addition to the statement of the cause of action, as will be explained hereafter.

17. **Conclusions of law not to be stated.**—Conclusions of law are the inferences or rules of law to be deduced from the ultimate facts stated. Since one of the objects of stating a cause of action is to notify the opposite party of the claim to be proven against

him at the trial, conclusions of law are not to be used. They are too general, covering too many situations of fact, to be sufficient to notify the opposite party and the court of the particular claim which has been brought into court for determination.

But, on the general objection that it does not state a cause of action, a statement will not be rejected merely because it contains conclusions of law, if the ultimate facts to show a cause of action are included within the statement. However, an application to strike the conclusions out of the statement will be allowed, if it appear to the court that they really do confuse. Even if they do not, the court may nevertheless allow the application, since the words are unnecessary and tend to encourage loose and careless statements; but the court is not obliged to sustain the application.

Conclusions of law are sometimes necessary or useful to identify the cause of action intended by the facts stated, for it may be that the very same facts will state either of two causes of action. In such a case, the conclusions of law are always permissible.

18. **Discovery.**—At the very beginning of their history, courts of equity "probed the conscience" of the parties, and their jurisdiction was exercised to elicit a discovery of those evidentiary facts "affecting the merits of the equity case, which might be in the knowledge of one or other of the parties or of both, and to compel the discovery and production of deeds and documents in their possession."[14] The

[14] 1 Spence, 677.

party, however, was not permitted to require evidentiary facts from his adversary, except in support of the ultimate facts stated by him for the purpose of revealing his own cause of action. Such discovery was incidental to the relief sought.

At a later time, because the common law courts would not permit either of the parties to the action at law to testify, with the result that there was often a failure of justice, because crafty men would have possession of documents which would be the only evidence available to prove a cause of action or a defense in the common law action in favor of their adversary parties, the equity courts allowed the party to file a proceeding in equity to obtain discovery of the facts or of the documents in support of his own cause.[15] In this proceeding, discovery was not incidental but was the sole object of the proceeding. After discovery, the parties proceeded with the other action.

At the present time, proceedings solely for discovery are rarely used, since the adversary may be placed upon the stand or his deposition taken in proceedings at law or in equity.

In a proceeding brought solely for discovery, it may be said that discovery is the cause of action and that it is stated by the facts showing the right to discovery; when discovery is incidental, it depends upon the cause of action stated for relief and must pertain to such cause of action.

19. **How discovery is stated.**—It will be remembered that the statement of the cause of action

[15] Gibson, Suit in Chancery (Rev. ed.), p. 1116.

should not include evidentiary facts, but this is not true of the statement of the facts which the adversary party is asked to divulge. In a proceeding in which discovery is sought as incidental to the cause of action stated, the very facts sought as incidental discovery consist of "evidentiary facts," and it is therefore proper that discovery should be stated largely by means of such facts, in contrast to the rule applying to the statement of the cause of action by the ultimate facts.

20. **Construction of pleadings.**—In suits between sovereign states it is the duty of the court to mould the rules of pleading and practice in such manner as to bring the case to final hearing, and in ordinary cases between individuals the courts of equity have always exercised an equitable discretion in relation to the rules of pleading, whenever it has been found necessary to do so in order to accomplish the purpose of justice.[16]

But while the rules of pleading are less strict in equity than at law, regard is had to the great objects of pleading, so that injustice cannot be done by means of loose methods. The defendant, for instance, cannot plead so loosely as to avoid giving real discovery or evade the right of plaintiff to search his conscience.[17]

The character of a pleading is determined by the statements it contains, and not by the name given or endorsed upon it.[18]

[16] Rhode Island v. Massachusetts, 14 Pet. 210 (U. S.).

[17] Hardman v. Ellames, 5 M. & K. 732 (Eng.).

[18] Northman v. Liverpool, etc., Ins. Co., 1 Tenn. Chan. 312; Arnold v. Moyers, 1 Lea 308 (Tenn.).

B. Parties.

21. **Parties—In general.**—It is obvious that all persons should be permitted to sue or be sued in a court of justice, except those who are disqualified because of some rule of law, or because they are incapable of caring for their own interests by reason of natural incapacity. Of the former class are aliens under certain circumstances, alien enemies, and married women in jurisdictions where the common law rule as to their incapacity has not been changed by statute. Of the latter class are infants, lunatics, and idiots.

22. **Aliens.**—Aliens, ordinarily, may sue, and of course, may be sued in a court of equity. However, though an alien friend is under no personal disability to sue, yet the subject matter of the suit may be such as may prevent the court from hearing it. Thus, under the laws of some states, an alien cannot hold land, and, accordingly, an alien friend cannot bring an action by which he may take land, or enforce specific performance of a contract to convey land to him, for this would be to allow him to do indirectly what he could not do directly, namely, take and hold land.

23. **Same subject—Alien enemy.**—Generally, an alien enemy will not be permitted to sue, since he will thus be asking the court to assist him with a judgment when he, theoretically at least, is a subject of a power inimical to the state or sovereign which established and maintains the court. But when an alien enemy is permitted to be sued, it is

said that he should be permitted to make a defense, and even to file a bill of discovery in aid of the defense.[19]

24. **Married women.**—Except where the rule is altered by statute, a married woman must sue and be sued with her husband as at common law, which holds that her identity is merged into that of her husband. There are, however, three exceptions to the rule: (1) Where she claims rights in opposition to those of her husband, in which case she sues by her "next friend," who is someone else than her husband; (2) where her husband sues her to establish some right recognized in equity, in which case she is represented by a guardian ad litem (for the suit); (3) in suits with respect to her separate property, where she sues by next friend or is sued and is represented as above. Her husband, however, in this case, may be the guardian.[20]

25. **Idiots and lunatics.**—Idiots and lunatics may sue at law by their next friend but in equity they must sue in the name of the committee or guardian of their estates, duly appointed, unless there be a partial natural disability, as in case of one deaf and dumb. In the latter case, the court will appoint someone to join with him as next friend.[21]

But the rule that suit can be brought only by committee or guardian of the lunatic is relaxed where it may be necessary to preserve the estate of the supposed lunatic pending an inquiry, called an

[19] Story, Equity Pleading (10th ed.), § 53, note 4.
[20] Story, Equity Pleading (10th ed.), §§ 61-63.
[21] Dorsheimer v. Roorback, 18 N. J. Eq. 438.

inquisition, to secure the appointment of the committee or guardian.[22]

26. **Infants as plaintiffs.**—An infant cannot bring suit by himself for the reason that the law, out of regard for his interests, presumes that he lacks discretion, and for the further reason that he cannot be held liable for costs. Suit, therefore, is brought in his name by some authorized person styled in the pleading as his "next friend."[23] This person is created as an officer of the court and is responsible for the costs of the suit. But a mere volunteer cannot sue for the infant.[24] He must be the person who is the general guardian of the infant, or the infant's nearest relative, or, failing these, someone whom the court determines to be one who will care for the infant's interests. If it be charged in the suit that the person acting as the next friend is not proceeding for the infant's best interests, or that the suit is not to the best interest of the infant, the court will inquire and direct proceedings accordingly. The title of the suit is in the name of the infant "by ———— as his next friend."

27. **Infants as defendants.**—Suits against infants are brought against them personally, but after the institution of the suit the court appoints some suitable person, styled the "guardian ad litem," to represent the infant's interests, unless, under the law of the particular state, a guardian of his estate has been appointed by the probate or other court.[25]

[22] Roughan v. Morris, 87 Ill. App. 642.
[23] Story, Equity Pleading (10th ed.), § 57.
[24] Jarvis v. Crozier, 98 Fed. 753.
[25] Colt v. Colt, 111 U. S. 556, 28 L. Ed. 520.

The guardian is never appointed on the nomination of the adverse party, because it would be improper to permit the latter to name the person who is to resist his claim against the infant.[26] If there is no general guardian, it devolves upon the plaintiff to suggest to the court the infancy of the defendant, and he should not proceed with the case until this appointment is made.[27] The father is usually the proper person for the guardian ad litem, but not always, as a court of equity regards itself as peculiarly bound to see that the interests of the infant are properly represented and will, therefore, see that a suitable person is appointed.[28] But a federal court has held that a father, who files an answer without having been appointed by a court, binds the infant. On the other hand, a judgment has been reversed under similar circumstances, it being stated that the plaintiff should have ascertained the infancy in the first instance and not after the trial was over.[29] This seems to be the rule. Nor can a judgment by default, that is, a judgment or decree when the defendant infant fails to plead, nor a judgment pro confesso be taken against him.[30]

28. **Joinder in general.**—It is a rule in courts of equity generally, that all persons interested in a suit, or to be affected by the results, should be made parties,[31] because equity avoids a multiplicity of suits

[26] Knickerbacker v. De Freest, 2 Paige 304 (N. Y.).
[27] Swan v. Horton, 14 Gray 179 (Mass.).
[28] Bank of the U. S. v. Ritchie, 8 Pet. 128, 144 (U. S.).
[29] Johnson v. Waterhouse, 152 Mass. 585.
[30] Enos v. Capps, 12 Ill. 255.
[31] Simkins, Federal Suit in Equity (2d ed.), p. 223.

if possible, and the rights of no one should be determined without an opportunity to prosecute or defend. This rule will, however, not be permitted to do injustice or to impose unnecessary burdens. It is therefore relaxed where either of these will result. Hence, no uniform test can be adopted, the determination of the joinder of an absent person depending upon whether his rights are substantially concerned in the pending cause.

29. **Classes of parties.**—Under the usual equity practice, parties are divided into two classes, proper and necessary. The first class relates to those who may properly be joined in the suit, and the second to those who must be joined. If the merits of a cause can be determined without prejudice to the rights of an absent person, or if the circumstances make the application of the rule wholly impracticable, the court will proceed without him. But if the rights of the parties to the cause cannot be established without making other persons parties also, or if the rights of other persons will be prejudiced by the decree, the court will not proceed, even though such persons cannot be reached by process so as to be brought into court.

In the federal courts there are three classes of parties, formal, necessary and indispensable. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject matter of the suit, which may conveniently be settled and further litigation prevented. They may or may not be parties at the option of the plaintiff. Necessary parties are

those who have an interest in the controversy but whose interests are separable from those of the persons before the court and who will not be directly affected by a decree which does complete justice between such other persons. They should be made parties in order to end the litigation. But if their interests can be protected so that the decree does not pass upon their interests, they may be omitted when they cannot be gotten into court because outside of its territorial jurisdiction, or when their presence would prevent the federal court from taking jurisdiction of the case. Indispensable parties are those who not only have an interest in the subject matter of the suit, but whose interests are such that a final decree cannot be made without affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[32]

30. **Exceptions to rule.**—The general rule that all persons who are interested in the object of the suit should be made parties is subject to several exceptions, as follows:

When it is utterly impracticable to make the absent persons parties, because (a) they are out of the jurisdiction and cannot be reached by a process of the court ordering them to appear; (b) when they are very numerous and they could not be joined without great delay and inconvenience and their interests are really represented by parties present. Where a bill in equity for an account was brought by one partner against another in a partnership con-

[32] Shields v. Barrow, 17 How. 130, 139 (U. S.).

sisting of four members and the bill stated that the other two were out of the jurisdiction and that they had received their full share of the partnership goods, and that the defendant had received much more than his share and the plaintiff much less, it was held that the absent partners need not be joined in the suit.[33] On the other hand, if the suit had been for a dissolution of the partnership, the absent partners would have been necessary for the reason that their interest in the object of the suit was substantial.[34] The rule as to dispensability ordinarily is that if the persons out of the jurisdiction are merely passive objects of the judgment of the court, or if their rights are merely incidental, then they may be dispensed with as parties.[35]

[33] Towle v. Pierce, 12 Metc. 329 (Mass.).
[34] Fuller v. Benjamin, 23 Me. 255.
[35] Story, Equity Pleading (10th ed.), § 81.

CHAPTER II.

THE PLEADINGS.

A. Of the Plaintiff.

1. The Bill.

31. **Definition.**—The plaintiff brings his claim before the court by means of his first pleading called the bill. When the state was a party, its first pleading was formerly called the information, and this name is still preserved in some jurisdictions. Informations, however, differ from bills little more than in name and form, and the same rules are, in general, applicable to both.

When the suit immediately concerns the rights of the state, information is filed in court in the name of the state "on the relation of the Attorney General," but when the proceeding does not directly concern the sovereign, the name of the private party is inserted in the information, and he is termed the relator. If, in connection with the state, he have an interest in the cause of action, then his personal claim is joined with that of the former, and the pleading is called an information and bill.[36]

32. **Of what the plaintiff's claim must consist.**—From what has been stated, it is clear that the plaintiff's claim must consist of a cause of action, though it may also include discovery. Therefore,

[36] Story, Equity Pleading (10th ed.), § 8.

the bill must contain the statement of the ultimate facts which reveal a cause of action in the plaintiff as against the defendant.[37] Discovery may be sought as incidental to the cause of action, or it may be that the bill is brought for discovery alone. In the latter case, it may fairly be said that the cause of action consists of the statement of the grounds which entitle the party to the discovery and that, therefore, the statement of the discovery is also the statement of the cause of action, for, as has been explained, equity will give discovery in aid of another cause of action brought in another court or in the same court in another suit. But in a general sense the statement of the grounds for discovery in a bill of discovery, as it is called, amounts to the statement of a cause of action.

But a bill brought substantially for relief and asking also for discovery cannot be maintained for discovery if it cannot be maintained for relief, for in such case the discovery is sought in aid of the claim for relief, and if this claim does not entitle the party to the relief sought, discovery will be in vain, and the time and effort spent to get the discovery would have been spent for naught.[38]

But bills of discovery are little used at the present time because the desired information may now be obtained by making the party a witness or by interrogatories.

33. **Formal parts of the bill.**—Anciently, the bill consisted of nine formal parts, namely, (1) the ad-

[37] Chase v. Palmer, 25 Me. 341.

[38] Emery v. Bidwell, 140 Mass. 271; McClanahan v. Davis, 8 How. 170 (U. S.); Venner v. Atchison, etc., R. Co., 28 Fed. 581.

dress; (2) the introduction; (3) the stating part or premises; (4) the confederating part; (5) the charging part; (6) the jurisdictional clause; (7) the interrogating part; (8) prayer for relief; and (9) prayer for process. Of these, only five were commonly used, to wit, the stating and charging parts, the interrogatories, the prayer for relief, and the prayer for process. But all of these may be dispensed with excepting the stating part and the prayer for relief.[39]

Under the federal practice it is sufficient for the bill to contain, in addition to the usual caption:[40]

First, the full names, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties, as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If

[39] Comstock v. Herron, 45 Fed. 660.

[40] The caption consists of the title of the court and the names of the parties.

special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.[41]

For convenience of treatment, these parts will be examined in the order of their importance.

34. **Practice parts of the bill.**—The bill also has certain parts that are required by the practice, namely, the signature and the verification.

35. **Stating part of the bill.**—The formal part of the bill containing the statement of the cause of action is called the stating part, or premises, and the old pleaders expressed the same with considerable formality. It should not be intermingled with other parts of the bill, for this might lead to confusion and to the fault of uncertainty and lack of positiveness, but, on the other hand, if the ultimate facts are specifically stated, there is no rule of law which requires that those facts should be alleged in a formal stating part of the bill.[42]

Logically, however, the statement of the cause of action will be most clearly given separately from the other parts of the bill.

The bill must state every fact necessary to show a cause of action in favor of the plaintiff,[43] and also the performance of every equitable act required of him under the circumstances as a condition precedent to access into a court of equity to ask that equity be done, such as a tender of payment of an

[41] New Federal Equity Rules, rule 25.
[42] Story, Equity Pleading (10th ed.), § 32.
[43] Perry v. Carr, 41 N. H. 371.

amount admitted to be legally due in a suit to restrain the collection of an amount in excess thereof.[44] If the facts stated in the bill are overcome by proof, the plaintiff cannot have a decree merely because it appears that issues might have been made by pleading still other facts upon which he would have been entitled to relief.[45] He must bring into court by his pleading every fact necessary to state his cause of action and to show his right to ask the aid of the court at that time, both for the purpose of getting his claim before the court and being allowed to prove the fact.

36. **Charging part of the bill.**—The discovery sought is often stated or based upon the charging part of the bill, which is used for two purposes:

(1) To anticipate the defenses which the plaintiff charges that the defendant claims and either to deny the existence of the facts by which these defenses are stated or to confess and avoid the effect of the defense which the plaintiff charges as claimed by the defendant. For example: The plaintiff charges "that the defendant will claim that the plaintiff by his certain writing released defendant from all claims; but plaintiff, that said writing was obtained by the false statements of the said defendant that * * *", followed by a statement of facts to show that the writing was obtained by deceit on the part of the defendant. The statement of the claim of the defendant and the plaintiff's counter-attack thereon is necessary because the bill is the only pleading

[44] Johnson v. Roberts, 102 Ill. 655.
[45] Dorn v. Geuder, 171 Ill. 362.

y which the plaintiff can bring facts into court. His other pleading, the replication, is limited to ther purposes. Formerly this was not the case, he pleadings in equity following the analogy of the ommon law pleadings, by which the parties could lternately plead their several defenses against the dversary's pleading of facts. Should the plaintiff mit the anticipated defense of the defendant he ay be allowed to amend so as to meet it by stating ew facts that confess and that avoid, but it is more onvenient to charge the defense in the first place nd meet it then.

In the federal courts, although the recent changes ade by the new rules omit any reference to anticiated defenses, it is obvious that these may still be harged and met as before.[46]

(2) To charge some evidentiary facts which the laintiff desires the defendant to discover or to exlain as proving the existence of the ultimate facts ontained in the stating part of the bill. The reasons or this and the extent to which evidence may be btained from defendant have already been exlained.

If the bill is sworn to, it is perjury for the plaintiff nowingly to make a false charge in this part of he bill.[47]

37. **Interrogatory part of the bill.**—Though formerly highly useful and almost universal in practice he interrogatory part is at the present time but ittle used, owing, no doubt, to the possibility of

[46] Hopkins, Federal Equity Rules, 158.
[47] Smith v. Clark, 4 Paige 368 (N. Y.).

getting evidence from the defendant by deposition or by making him a witness at the hearing or trial. The interrogatory may be general, asking that the defendant answer the contents of the bill, or it may be special, consisting of specific inquiries, which the defendant is required to answer, provided the questions are justified by the facts contained in the stating and charging parts of the bill.[48] These interrogatories are addressed to the defendant and not to third persons. The latter are examined orally as witnesses in the cause.

38. **The address.**—In early times, redress for wrongs not remediable at law was obtained from the king, and the petitions, or applications, were made to him; in later times, to his chancellor. Consequently the bill, in its final form, contained a formal address to the person or persons who had the actual custody of the Great Seal under which the writ permitting suit could issue.[49] In the United States the address of the bill is to the court from which the relief is sought and contains its technical and appropriate description. Consequently the address must be varied accordingly. Thus, in Massachusetts and Maine the bill is addressed "To the Honorable the Justices of the Supreme Judicial Court." In the District Courts of the United States the address is, "To the Judges of the District Court of the United States for the District of ————, ———— Division."

The address is required in all bills.

[48] Story, Equity Pleading (10th ed.), § 36.
[49] Daniel, Chancery, *357.

39. **Introduction.**—The introduction contains the full names of the plaintiffs, the character in which they sue, their residences, and, in the federal courts, their citizenship. The object of such a statement is to enable the court and the other parties to know where and to whom they are to resort to compel obedience to any order or process, such as for the payment of costs or to punish for improper conduct, as well as to identify the subject matter of the suit and the parties in case of future litigation.[50]

This part also usually contains the names and addresses of defendant, although these are often found in the stating part. But the federal courts require these to be stated in the introduction.[51]

40. **Confederating part of the bill.**—A confederating clause alleged a combination between the defendants and others to injure and oppress plaintiffs. It is of little use in practice, being treated as impertinent, and need not be denied or responded to in the answer. It was inserted in the bill under the mistaken belief that without it the names of additional persons with whom the conspiracy was charged, but whose names were alleged to be unknown, could not be added by amendment. Since specific allegations of the ultimate facts are required to state fraud, the confederating clause is a mere conclusion of law, and may well be omitted from the bill.

41. **Jurisdiction part of the bill.**—This part was a formal clause consisting of the general statement

[50] Story, Equity Pleading (10th ed.), § 26.
[51] New Federal Equity Rules, rule 25.

that the "plaintiff is remediless * * * according to the strict rules of the common law, and can only have relief in a court of equity." This is wholly unnecessary, for the jurisdiction of the court depends upon whether the bill states a cause of action and not upon such a formal statement, which is, after all, only a mere conclusion of law. It is now generally omitted.

42. **Prayer for relief.**—In equity the kind of relief desired must be prayed for and the prayer varies according to the ultimate facts of the various bills. They are, however, divided into two classes, general and special. The latter designates the particular relief to which the plaintiff thinks himself entitled, but which must follow as a matter of law from the case stated in the stating part of the bill, for the plaintiff is entitled only to that relief which is the legal result of the facts stated. The prayer for general relief is "for such other and further relief as may be just and equitable," and can never be properly and safely omitted, for if the plaintiff should mistake the relief which he prays in the special prayer the court may give him that relief to which he is entitled by the general prayer based upon the ultimate facts stated in the bill.[52]

In case of bills for charities and of bills on behalf of infants, relief will be granted upon the facts of the case though not particularly requested in the prayer.[53] This is so because of the peculiar regard which equity has for charities and persons under

[52] Story, Equity Pleading (10th ed.), § 40.
[53] Story, Equity Pleading (10th ed.), § 40, note 5.

natural disability. In the federal courts only special relief need be prayed, which may be stated and sought in alternative forms,[54] for when the plaintiff is in doubt as to whether he is entitled to one kind of relief or another he may pray in the alternative, provided the facts upon which the relief is prayed are not inconsistent.[55] Where the plaintiff desires to restrain the defendant by an injunction this must be expressly prayed, because the defendant might, by his answer, make a different case under the general prayer from what he would if the injunction were specially prayed. The relief granted must always be consistent with the manifest purposes of the bill as shown by the ultimate facts pleaded.[56]

While it may be said that in a general sense all bills are for relief, there are certain bills which are not classed as such, and if these bills contain a prayer for relief they will, in England though not in this country, be open to objection as a whole.[57] In this country only the prayer for relief will be open to attack by demurrer,[58] a pleading devoted to raising objections that appear upon the face of the bill.

43. **Prayer for process.**—Under the general practice the bill must contain a prayer for the issuance of the process of the court, called a subpœna, by which the defendant is commanded to come into court to plead to the bill. This is necessary, be-

54 New Federal Equity Rules, rule 25.
55 Cella v. Brown, 144 Fed. 742.
56 1 Daniel's Chancery, 378, note a.
57 Story, Equity Pleading (10th ed.), §§ 17, 312.
58 Same, 312.

cause the defendant is brought in only after the court has scanned the bill to see if it states a cause of action. Process does not issue as a matter of course but only when the court has been requested to cause the defendant to be brought in personally to have his conscience searched.

The prayer must name the defendants specifically[59] and must designate the capacity in which they are sued,[60] such as executor or guardian if they are sued as such, and none are parties against whom process is not prayed.[61]

Informal defects in the prayer for process may be aided by the other parts of the bill.[62]

Objections to it for its defects are made by demurrer in the state practice,[63] but these are waived if the defendant comes in and files a plea or answer to the merits.[64]

This prayer is, however, no longer necessary in the federal courts, having been omitted as one of the parts of the bill.[65]

44. **Practice parts of the bill.**—In addition to the formal parts of the bill heretofore stated the following are required: 1. the signature; 2. the verification.

Signature. Every bill must be signed by counsel and, in addition, in some instances by the plaintiff. Since the bill is drawn by counsel he should be re-

[59] Carter v. Ingraham, 43 Ala. 78.
[60] Same.
[61] Howe v. Robins, 36 N. J. Eq. 19.
[62] Evans v. Evans, 23 N. J. Eq. 71.
[63] Palmer v. Stevens, 100 Mass. 461.
[64] Sage v. Thomas, 3 Blatch. 11 (U. S.).
[65] New Federal Equity Rules, rule 25.

sponsible for its contents. If it contains matter criminal, impertinent, or scandalous, such matter may be expunged and the counsel ordered to pay costs.

In the federal court the bill or other pleading must be signed individually and not in the firm name, if there be more than one counsel,[66] and such signature is considered as a certificate of each individual that he has read the pleading; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is contained therein, and that the pleading is not interposed for delay. This implied certificate applies to all pleadings signed by counsel.

The signature should follow immediately after the close of the formal parts of the bill, but signature on the back of the bill has been held sufficient.[67]

The party plaintiff may also sign the bill himself.

Verification. Verification is supporting the pleading by written oath made before an officer having authority to administer the same and is placed immediately following the signature. It is not a matter of form, but where required by rule of court or by statute, it must be done in order that the bill may be good. As a general rule a verification should be made whenever the bill seeks some immediate order or interposition of the court, such as an injunction, an attachment, or a ne exeat,[68] which is a writ commanding the person against whom it is issued

[66] New Federal Equity Rules, rule 24.
[67] Dwight v. Humphreys, 3 McLean 104 (U. S.).
[68] Gibson, Suits in Chancery (Rev. ed.), p. 161.

not to go out of the territorial jurisdiction of the court.

It is much better practice for the party and not the counsel to swear to the pleading and in instances where the facts must be sworn to positively and not upon mere information the oath must be made by the person having actual knowledge thereof.

In the federal court when special relief is prayed for, the bill must be verified by the plaintiff or by someone having knowledge.[69]

45. **Joinder of causes of action.**—For the sake of the convenient administration of justice, equity desires to avoid a multiplicity of suits and permits the joinder of two or more causes of action in the same bill, provided this joinder does not itself cause an inconvenience to the court or a substantial injury to the rights of the defendant.

No general test of proper joinder can be laid down. That depends upon the circumstances of the particular case and much must be left to the sound discretion of the court.[70]

46. **Multifariousness.**—Multifariousness consists in the improper joinder of different causes of action or of different parties in the same suit.

The union of several causes of action of a distinct and independent nature, or of defendants who are not interested in all of the causes of action stated, is forbidden, because the defendant or defendants, by the joinder, would be compelled to plead to different matters wholly unconnected with

[69] New Federal Equity Rules, rule 25.
[70] Oliver v. Piatt, 3 How. 333 (U. S.).

each other, so that proofs applicable to each would be apt to be confused with each other, and great delay be thus occasioned to some causes of action at issue because the others were not ready.

47. **Bill with double aspect.**—While the bill should notify the defendant clearly and definitely of the particular cause of action brought, it is sometimes necessary, from the particular circumstances of the case, that it be brought with a double aspect; thus, if it be desired to set aside a deed on the ground of fraud and undue influence, the bill may charge insanity of the party making the deed and it may also charge great weakness and imbecility of mind of the maker. The case is founded upon fraud and undue influence which might be exercised when the maker was either insane or very weak in mind.[71] The two aspects, or alternatives, must, however, be the foundation for precisely the same relief and be consistent with the case made,[72] and care also must be taken that the bill be unambiguous.

2. The Replication.

48. **Definition.**—Under the present practice the new facts stated in the defendant's plea, or answer, are placed in issue by a formal denial contained in a pleading called the replication.

In the federal court, however, unless the answer assert a claim of the defendant against the plaintiff, a reply, as it is called in that court, is unnecessary

[71] Story, Equity Pleading (10th ed.), § 254; Simkins, Federal Suit in Equity (2d ed.), p. 284.

[72] Simkins, Federal Suit in Equity (2d ed.), p. 284.

unless required by special order of the court or judge, and any new or affirmative matter in the answer is deemed to be denied by the plaintiff, so that the cause is generally at issue upon the filing of the answer.[73]

B. Of the Defendant.

49. **In general—Defendant's pleadings.**—The defendant's pleadings are the demurrer, plea, and answer, to which may be added a fourth, called an exception, though this is not strictly a pleading.

Under the federal practice, demurrers, pleas, and exceptions are abolished,[74] but the defenses and objections still exist. Failure of the bill to state a cause of action heretofore raised by demurrer is now raised by motion to dismiss or by answer.[75] Defenses are now asserted in the latter,[76] and objections to the bill for scandal or impertinence are made by motion to strike out,[77] while indefiniteness and uncertainty are raised by a motion for a further and better statement or for further and better particulars.[78]

Since a bill may contain several distinct claims, such as a cause of action, grounds for discovery, and interrogatories, the several defenses adopted by the defendant should distinctly state whether each is to the whole or part of the bill, and, if to a part, which part.[79]

[73] New Federal Equity Rules, rule 31.
[74] New Federal Equity Rules, rule 29.
[75] Same.
[76] Same.
[77] Same, rule 21.
[78] Same, rule 20.
[79] Story, Equity Pleading (10th ed.), § 695.

The defendant should not demur and plead, or demur and answer, or plead and answer to the same part of the bill, for by so doing the later pleading overrules the former. This is so because the demurrer is filed in order not to plead or answer, and the same reason applies to the plea as preceding the answer.

1. The Demurrer.

50. **Definition.**—The demurrer is the pleading by which the defendant objects to the bill for certain deficiencies in form or for the want of equity. It virtually says to the court, "Stop! I ask the judgment of the court whether I am compelled to plead to this bill. I say I should not for the reason that it is defective in the following respect," following this by pointing out the alleged defect. It does not say this in the above language, but such is the real meaning of the formula used when the defendant says that he "demurs" for the reason stated.

As noted above, the motion is substituted for the demurrer as the means by which the objection is raised in the federal courts.

51. **The defense made.**—The demurrer attacks the bill for defects apparent upon the face of the bill. It raises a question of law and not a question of fact, for the demurrer is not used to bring facts into court. If it attempts to do so, or to raise a question of law which needs to have additional facts brought in, it is called a "speaking demurrer" and will be overruled. Facts are brought into court by other pleadings of the defendant.

If the defects are such that they cannot be remedied by an amendment of the bill, the demurrer ends the suit; if the defects can be remedied, then the demurrer only delays proceedings. If the defects are merely in the form of the bill, omitting to demur will waive the objection, but if the defect be such as goes to the jurisdiction of the court, such as the omission of the citizenship of the parties in the federal court, it cannot be waived. If the defendant's demurrer is overruled by the court he can either "stand on" it, or, as it is called in equity, "abide by" it, allow decree to be entered against him, and then raise the question upon an appeal to the higher court.

52. **Kinds of demurrers.**—There are three kinds of demurrers, general, special, and demurrers ore tenus (by word of mouth). The first two are distinguished from the third by being in writing.

A bill must bring into court a subject matter about which the court has the power to entertain controversies; it must also state all the ultimate facts sufficient to show an equitable cause of action. If it fail to do either, the defendant may demur generally "for want of equity in the bill" without specifying more particularly the objection. But if he objects for other defects apparent upon the face of the bill, he must point them out specially, such as failure to join certain persons when the statement of the cause of action shows that they are necessary to the determination of the controversy. A demurrer for nonjoinder or misjoinder of parties, or for misjoinder of causes of action (multifarious-

ess) must point out the defect and state wherein ne bill is faulty.

53. **Ore tenus.**—An oral demurrer may be made t the hearing of the argument of a written demurrer, but it must be to the same part of the bill s is the written demurrer. Even if the grounds of ne written demurrer are held not to be good on the rgument, the demurrer ore tenus may be sustained ecause it does state a sufficient objection to the bill.

54. **Grounds of demurrer.**—The grounds of a emurrer to a bill for relief may be any one or more f the following: (1) That the bill shows on its ace that the court has no jurisdiction over the subect matter of the suit or over the parties; (2) That shows that there is (a) a nonjoinder, or (b) a misjoinder of persons as parties, or (c) that there a lack of capacity to sue; (3) That the bill is efective in its frame, such as the omission of a ecessary part or a defective statement thereof, or at it is bad in form for multifariousness of causes f action; (4) That the remedy will not lie, or that ne suit is barred, because of the Statute of Limiations, the Statute of Frauds, or of laches in bringng suit, and the like; (5) That the bill does not tate a case that can be heard and determined in is court.

The grounds of demurrer to a bill of discovery are, hat the bill shows a question or circumstances that ill subject the defendant to criminal prosecution, a forfeiture, or a penalty, or to the revelation of communication privileged in law, such as between usband and wife, or lawyer and client.

55. **Effect on the facts.**—The demurrer admits the existence of the facts well pleaded in the bill. It does this for the sake of raising the question of law, and if the demurrer is overruled and the defendant does not "abide by" his demurrer, he may impliedly withdraw his admission by making his next pleading to the bill or to the same part of the bill. The demurrer does not admit the existence of any statement other than facts, and of these, only those which are pertinent to the bill.

2. The Plea.

56. **Definition.**—A plea is a pleading used by the defendant either to deny the existence of a fact or set of facts stated in the bill, or to state new facts which reveal a proposition of law that will avoid the necessity of making an answer,[80] or, under certain circumstances, both to assert new facts and to deny other facts pleaded in the plaintiff's bill.[81] It is, therefore, the defendant's first pleading that deals with the existence of facts.

57. **Purpose of plea.**—The purpose of this pleading is twofold:

(1) To enable the defendant to avoid giving discovery of those facts which the plaintiff otherwise might have by the aid of a court of equity; (2) To avoid the delay and expense incident to the answer, which is the pleading devoted primarily to meeting the merits of the bill or to giving the discovery sought. These two are advantages to which may

[80] Farley v. Kittson, 120 U. S. 303.
[81] Langdell, Equity Pleading (2d ed.), § 101.

e added that of confining the admission of fact to ne purposes of the particular suit, while those of n answer are actual and binding upon the defend- nt for all purposes.[82]

58. **Plea must be single.**—Such being its purpose, ne plea must not raise more than one single point hich, in effect, will avoid giving answer to the bill r that part of the bill to which the plea has been irected. It is, therefore, the rule that a plea must aise but a single point of law;[83] thus, the plea of tle derived from the person under whom the plain- ff claims may consist of a variety of facts, but the tle is only a single point, and if plaintiff, in turn, enies the existence of these facts there is but one oint of law to be determined.

59. **Multifarious pleas.**—Therefore, if a plea con- ains two or more points as reasons why the defend- nt should not answer the bill or part of the bill hich the defendant desires to avoid answering, the lea is objectionable as being multifarious. For the atement of more than one defense here causes the ery situations which the plea was invented to avoid, amely, those of expense, delay,[84] and a complication f questions. Thus, a plea of the Statute of Limita- ons, and one that the plaintiff is not the admin- strator of the estate in behalf of which he sues, erve to make the pleading double.[85]

But a pleading is not double if the additional tatements do not raise more than one point of law,

82 Langdell, Equity Pleading (2d ed.), § 99.
83 Rhode Island v. Massachusetts, 14 Pet. 210, 229 (U. S.).
84 Rhode Island v. Massachusetts, 14 Pet. 210, 219 (U. S.).
85 Goodrich v. Pendleton, 3 Johns. Chan. 384 (N. Y.).

although they may be unnecessary and, therefore, objectionable on that ground. And this is true even if the additional words, or even the same words, attempt to state more than one defense but fail either because of insufficiency of statement or of substance. If two or more defenses are not stated the plea cannot be double, however objectionable it may be on other grounds.

Though the plea is not the proper pleading by which a question of law, apparent upon the face of the bill, is raised, if it does raise such a question, and in addition plead facts stating another point as a defense, the plea is double.[86]

60. **Multifarious pleas sometimes allowed.**—But equity pleading does not favor pushing a rule to the extent of embarrassing the administration of justice, and where great inconvenience might otherwise be sustained under particular circumstances, the court may sometimes, in its discretion, allow several pleas.[87] Thus, a plea that the plaintiff is not heir, as stated in his bill, and a plea of the Statute of Limitations, have been allowed in the same plea.[88] But the defendant cannot file such a plea without permission of the court given upon an application[89] showing good grounds for the indulgence.

61. **Separate pleas to separate parts of bill.**—But the rule given above against multifariousness does not mean that the defendant cannot plead sep-

[86] Hostetter Co. v. Lyons Co., 99 Fed. 735, 736.
[87] Lord Langdale in Kay v. Marshall, 1 Keen 190, 197 (Eng.).
[88] Bampton v. Birchall, 4 Beav. 558 (Eng.).
[89] McCloskey v. Barr, 38 Fed. 165.

rate pleas to different parts of the same bill; it merely prohibits his pleading, without permission, more than one defense to the whole bill, or to the same separate part of it, for a bill may have pleaded several distinct causes of action, or it may have set up a cause of action for relief and charged facts for discovery. In these and similar cases, a plea to each is not only proper but necessary, if the defendant desires to defend against them.[90]

62. **Statement of plea.**—The plea must obey the rules of good pleading as in case of the allegations of the bill. If it states facts, they must be stated positively, and must be identified with certainty. The statements themselves must not be evasive nor argumentative,[91] for notice cannot be given the court and the plaintiff, and issues cannot be produced without obedience to the fundamentals of pleading. Conclusions of law cannot be used to assert a defense or a necessary part thereof. Immaterial statements are impertinent and may be expunged.

63. **Pleas classified.**—Three different bases or means are used in the classification of pleas, namely: (1) The method of pleading used. (2) The essentials of the bill, generally called the grounds of the plea. (3) The effect of the plea.

According to the first, pleas are either pure or not pure. If they assert the existence of new facts, they are of the former class; if they deny the existence of some fact or facts in the bill, and in addi-

[90] 1 Daniel, Chancery, *610; Simkins, Federal Suit in Equity, p. 416.
[91] Simkins, Federal Suit in Equity (2d ed.), p. 416.

tion assert new facts, or if they only deny facts stated in the bill, they are of the latter.

Possibly a better classification upon the same basis is made by some of the authorities, who divide them into the following three classes: (1) pure, (2) anomalous, and (3) negative pleas.[92]

According to the second means of classification, pleas are of the following classes: (1) to the relief, (2) to the discovery, and (3) to both.[93]

The third classification refers to the effect of the plea, following the division of pleas at common law into two sorts—pleas in abatement and pleas in bar. The former question the propriety of the remedy, or the legal sufficiency of the process, rather than deny the cause of action; the latter dispute the very cause of action itself. However, it nowhere appears that any practical consequences in equity result from this division, and accordingly, the different pleas will be briefly considered according to the first two divisions.[94]

64. **Pure plea.**—A pure plea is one which asserts the existence of a fact or set of facts from which a proposition of law can be deduced to delay the suit, or abate it, or defeat the cause of action, or prevent making discovery in an answer. Its peculiar office, as distinguished from the other pleas under the same classification, is to bring new facts into the case for the above purpose.

In this connection, it must be understood that

[92] Story, Equity Pleading (10th ed.), § 651.
[93] Same, §§ 704, 816.
[94] 1 Daniel, Chancery, *626, 627.

acts stated in the charging part of the bill, as the anticipated defense claimed by the defendant, are not yet in court for the benefit of the defendant, since plaintiff has no right to bind the defendant by any statement of what the defendant may claim in the suit. The defendant has the right to bring in his own defense. If it consists of new facts, he states them in a pure plea.

65. **Anomalous plea.**—This plea states new facts and negatives some of the facts contained in the bill.[95] It is both affirmative and negative in character, and, therefore, as distinguished from the other two, anomalous. It is a plea not pure, since it is not confined strictly to the assertion of new facts.

This class of pleas owes its origin to the change made in the pleadings in equity. Originally, bills were very simple in their frame. The plaintiff filed his bill in which he set up his claim. The defendant, if he did not demur for good reason, stated his defense, in a plea to which the plaintiff made his replication. If this contained new facts which confessed the existence of facts in the plea and avoided their legal effect, the defendant used a rejoinder to bring issues of fact to issue, following the analogy of the common law system of pleading. But this order fell into disuse, and the plaintiff, instead of merely stating his cause of action in his bill, also anticipated the defense and charged it as being claimed by the defendant, and then, in addition, proceeded to charge other facts to avoid that defense thus filling the office of both the old bill and the

[95] Story, Equity Pleading (10th ed.), § 680.

former replication), requiring also that the defendant make discovery of the facts charged. Consequently a change became necessary in the way defendant should make his defense. His plea stated affirmatively his defense, then proceeded to negative the facts of the bill which were stated to avoid his anticipated defense. And as plaintiff sought a discovery of certain evidence charged, the defendant was compelled to discover or to deny the existence of such evidentiary facts. This he could not do in his plea, so he also filed an answer in support of his plea, of which more will be said hereafter.[96]

The denials in the anomalous plea may be either general or explicit, the only requirements being that the charges in the bill must be fully met.[97]

66. **Negative plea.**—Originally designed to set up new facts which revealed a question of law that would avoid giving discovery, the plea where the circumstances required the defendant to negative charges of evidence stated in the bill, contained negative allegations, such plea being termed anomalous. This paved the way for the plea which was solely negative, containing nothing beyond a denial of a certain fact or set of facts stated in the bill. At first, such a plea was disallowed, but later became fully established in the practice.[98] For example, if the jurisdiction of the court in a suit for divorce depends upon the residence of the parties within the territorial limits of the court's jurisdiction, it is

[96] Story, Equity Pleading (10th ed.), §§ 676, 678.
[97] Harrison v. Farrington, 38 N. J. Eq. 358.
[98] Langdell, Equity Pleading (2d ed.), § 102, note 1.

proper to deny by plea the statement of fact that the defendant "resides in Jefferson County, Illinois,"[99] since this saves the expense of a general hearing on the merits of the case. Even a better reason is found in the fact that the negative plea may save discovery in cases where the plaintiff, by falsely alleging title in himself, seeks to compel the exposure of the transactions of a commercial house or even of the private affairs of a family.

An answer in support of a negative plea is unnecessary unless, under certain circumstances, discovery is especially sought by the bill, and the defendant is required to answer interrogatories.[1] These special circumstances will be considered later.[2]

67. **Same subject — Limitations.** — The negative plea must deny the fact or set of facts the existence of which must be established in order to maintain the equity of the bill; that is to say, it cannot deny the ultimate facts of the cause of action, but is limited to that fact or set of facts which show one single point necessary to maintain the action. To illustrate the difference: in a suit for the infringement of a patent, a denial of the infringement would compel the examination of witnesses to establish that the defendant made, used, or vended the patented article. Now, the very object of the plea is to avoid this general examination.[3] On the other hand, a denial of the allegation of the bill that the patented

[99] Spangler v. Spangler, 19 Ill. App. 28.

[1] 1 Daniel, Chancery, *619.

[2] § 67, post.

[3] Korn v. Wiebusch, 33 Fed. 50.

article "had not been in public use or on sale for more than two years before the application therefor" puts in issue a fact that affects the patentability of the article.[4] Therefore, a denial of the facts to show infringement belongs to an answer, while the denial of one single fact to show patentability may be made in a negative plea.[5]

68. **Plea to the essentials of the bill.**—Pleas to the essentials of a bill for relief, or for discovery, or for both, are classified according to the essential point attacked, as follows: (1) To the jurisdiction; (2) to the person; (3) to the frame of the bill, and (4) in bar.

69. **Pleas to jurisdiction.**—Pleas to the jurisdiction are arranged under four heads: (a) That the subject matter of the bill is not within the cognizance of any court of justice; (b) That it is not within the jurisdiction of any court of equity; (c) That some other court of equity is vested with the proper jurisdiction, and (d) That some other court has the proper jurisdiction.

A discussion of each of the above and of the following three sections, would extend this article beyond its limits, and the reader is referred to the treatises upon the subject.[6]

70. **Plea to the person.**—These pleas object to the ability of the parties to sue or to be sued, and are of two kinds: (1) To the person of the plaintiff, and (2) to the person of the defendant. Those of

[4] Blessing v. Trageser Steam Copper Works, 34 Fed. 753.

[5] Story, Equity Pleading (10th ed.), § 652.

[6] Story, Equity Pleading (10th ed.), §§ 705-837; 1 Daniel, Chancery, *603-681.

the first class may be subdivided ordinarily into the following: (a) of attainder; (b) of alienage; (c) of infancy; (d) of coverture; (e) of idiocy or lunacy; (f) of bankruptcy or insolvency, and (g) of the want of the character in which the plaintiff sues, such as that of administrator or other personal representative.[7]

Of the pleas to the person of the defendant, it may be said briefly that persons attainted or outlawed cannot plead their own disability to a bill against them, but as to the other classes named above, it will be a good defense to the suit that the defendant is not the person that he is stated to be, or that he does not sustain the character in which he is sued, such as, heir, administrator, or as partner, and the like.[8] But a bankrupt may still be a party defendant if he be required for the determination of the controversy, as in case of discovery, or other relief for the purpose of assisting the investigation of the demands affecting the estate.[9]

71. **Pleas to the frame of the bill.**—These pleas differ from pleas to the jurisdiction in that they do not dispute the power of the court to hear and determine the controversy; from pleas to the person in that they admit the ability of the parties to sue and be sued; and from the pleas in bar because they do not deny the validity of the right, which is the subject of the suit, though they do assert that the right ought not to be examined in the existing record. They have been arranged under the following heads:

[7] Story, Equity Pleading (10th ed.), § 722.
[8] Story, Equity Pleading (10th ed.), § 732.
[9] Same, § 397.

(a) pendency of another suit; (b) want of parties; (c) multiplicity of suits; (d) multifariousness of the causes of action.

72. **Another action pending.**—Briefly, it may be said that another action is pending, when it is in another equity court of the same sovereign upon the same subject matter, between the same parties acting in the same right. The reason for the rule is that if the complaining party has already an action pending in which he can obtain full relief, there is no justification in harassing the defendant by a second action for the same subject matter.[10] But both suits must be in the jurisdiction of the same sovereign.

73. **Defect of parties.**—But little more need be said in addition to what has already been said on this subject. If some person or persons have been omitted from the bill, who are essential to the determination of the controversy, the defendant may demur, if the defect is apparent upon the face of the bill; otherwise he must plead the facts showing how and in what manner the absent person is essential to the suit.

74. **Multiplicity of suits.**—It is against the policy of equity to permit or to encourage a multiplicity of suits if the causes of action can be joined. Accordingly, if other facts than those appearing upon the face of the bill are necessary to show that there is a multiplicity of suits, the facts to show the same may be stated in a plea.[11]

[10] Radford v. Folsom, 14 Fed. 97.

[11] Story, Equity Pleading (10th ed.), § 746.

75. **Multifariousness.**—This fault is generally apparent upon the face of the bill; if not, then a plea stating the facts necessary to show the multifariousness of the bill may be used.[12]

76. **Pleas in bar.**—The principal classes of these pleas are as follows: (1) Those founded upon some bar created by statute; (2) those founded upon some record, or as of record, of some court; (3) those which consist of matters of fact, not of record. Of the first sort are such as depend upon the Statute of Limitations and the Statute of Frauds. Of the second sort are those based on judgments in courts of law, matters as of record, and decrees of a court of equity. The facts therein recited, in the absence of a showing of fraud, are taken as true. Of the third class, the principal pleas consist of releases, purchase for a valuable consideration, and laches. If the subject matter of the suit has been released by the plaintiff or the person under whom he claims, he will be bound, in the absence of fraud, or other objection which avoids a release. Under some circumstances, one who purchases the title or subject for value and without notice of the claims of others, in a situation where the law does not require him to ascertain the claims of others or take the risk of other claimants, may defend against any other claimants. Finally, if the plaintiff has waited an unreasonable time before bringing suit, he will be barred from pressing his claim.

77. **Determination of plea.**—It is not proper practice to dispose of a plea by demurrer, but a court

12 Story, Equity Pleading (10th ed.), § 747.

of equity, in its desire to determine the point raised, has treated the demurrer as equivalent to setting the case down for hearing, which is the proper way to attack the plea for insufficiency of form or of substance.[13] If the defendant is anxious to have the point settled, he may, himself, take the same proceeding. Upon argument, the plea may either be allowed, or overruled, or the benefit of it may be saved to the hearing on the fact, or it may be ordered to stand for an answer.[14]

78. **Consequences.**—If a pure or anomalous plea is allowed, the plaintiff may, by a denial in his replication, take issue upon the existence of the fact stated. If the defendant proves the facts in his plea, the suit, so far as the plea extends, is barred, even though the plea may not be good in form or substance.[15] If he fail, the court will order that he answer.

If the plea be overruled, the defendant, unless the court orders otherwise, must pay the costs occasioned thereby and may then make a new defense by a plea or by an answer.[16] If the benefit of the plea be saved to the hearing, the plaintiff has an opportunity to file replication to the plea, if that be necessary to bring to issue the existence of the facts raised by the plea, and the evidence thereon is gone into.[17]

If, upon argument, when the plea is set down for

[13] Spangler v. Spangler, 19 Ill. App. 28.
[14] Story, Equity Pleading (10th ed.), § 697.
[15] 1 Daniel, Chancery, *697.
[16] 1 Daniel, Chancery, *702.
[17] Same, *699.

hearing on its sufficiency, the court holds that the facts of the plea may be a defense or part of a defense, but that it has been informally pleaded, or is not properly supported by an answer, so that the truth is doubtful, the plea may be directed to stand for an answer. If so ordered, it is allowed to be a sufficient answer to so much of the bill as it covers, unless the order also gives the plaintiff liberty to except to the plea therefor.[18]

3. The Answer

79. **Place of the answer.**—If the defendant does not succeed with a demurrer or with his plea, or, if he does not choose to file either of these, he must file a pleading called an answer. If he does not do this, he will not be permitted to prove any defense, and judgment pro confesso may be taken against him, as hereafter explained.[19]

80. **Double office of the answer.**—It will be remembered that the plaintiff might seek in equity an equitable remedy for an equitable cause of action, or discovery in aid of another proceeding, or he might have the latter as incidental to the former. The defendant, therefore, may have to plead to the ultimate facts stated to show cause of action and also to furnish the facts sought by discovery. He may do both of these in his answer, which serves the double purpose of a pleading to the merits and furnishing the evidentiary facts sought for discovery. So far as it meets the cause of action, it is a plead-

[18] Kirby v. Taylor, 6 Johns. Chan. 242 (N. Y.).
[19] § 101.

ing; so far as it serves the plaintiff's purpose of discovering facts, it is evidence reduced to writing.[20]

81. **Answer must meet the whole bill.**—Subject to an exception, hereafter noticed, the defendant must meet the whole bill, and, therefore, if he should choose to answer or is compelled to answer, his answer must meet such parts of the bill as are not already covered by demurrer or plea. If neither of these has been used, then his answer must meet all the allegations and charges in the bill and all the interrogatories based upon and incidental to them.

In some jurisdictions, a statement of fact may be answered by a formal denial of all the facts, and in the federal court, all allegations other than of value or amount of damage are deemed confessed if not denied.

But if the bill searches the conscience of the defendant, a general denial, or no denial, is not sufficient. He must answer specifically, admitting this fact, denying that, or stating that he has no knowledge, information, or belief of such fact, and that, therefore, he denies it. This is because the plaintiff has the right to search the conscience of the defendant, if the facts of the bill justify the search. Under such circumstances, the defendant will not be allowed to remain silent; the plaintiff is entitled to know whether the defendant has any relevant knowledge, information, or belief, and, if he has, what such knowledge, information, or belief is.

As an exception to the general rule, the defendant is not compelled to answer any matters or state-

[20] Holt v. Daniels, 61 Vt. 89.

ments which are not materially a part of the case stated in the bill, but if he does discover as to circumstances or conversation, he must state the whole.[21]

82. **Knowledge, information, and belief.**—Generally, if a fact is charged as within the defendant's own knowledge, as of something done by himself, he must answer as to his knowledge, and not as to his remembrance and belief. In many cases, he cannot say that he has no knowledge, information, or belief of the facts, since the circumstances may be such that, as a matter of law, he is bound to know, as in case of a principal, where actual knowledge may be possessed by the agent. In such case, he is bound to inquire before answering.

In case of an interrogatory pertinent to a charge in the bill, requiring the defendant to answer it "as to his knowledge, remembrance, information and belief," which is the usual formulary, it is not sufficient for the defendant to answer as to his knowledge; but he must answer, also, as to his information and belief,[22] for searching the conscience of the defendant allows plaintiff to interrogate him as to his information and belief as well as to his knowledge. This is especially true in cases where the defendant claims to be an innocent purchaser for value, without notice. He might have no knowledge and yet have such information and belief as would put him upon inquiry.

83. **On interrogatories.**—In some courts, the de-

[21] Story, Equity Pleading (10th ed.), § 857.
[22] Brooks v. Byam, 1 Story 296 (U. S.).

fendant is not required to answer charges in a bill, unless specially interrogated thereto. This is the rule in the federal court, but other jurisdictions hold the contrary. To prevent evasion and consequent delay, it is better to add interrogatories concerning the matters considered to be most essential; yet under the general rule, where the general interrogatory or requisition is "that the defendants may, severally and respectively, full, true, direct, and perfect answers make to all and each of the statements and charges of the bill, as if the same were repeated, and they and every one of them distinctly interrogated thereto," the answer is defective if it omits to meet all the material charges and statements.[23]

84. **Answer must obey the general rules of pleading.**—The answer must obey the general rules of pleading, which are: (1) It must state facts and not arguments; (2) it must allege facts positively, unless it states the fact to be upon information and belief; (3) it must be certain, so far as the nature of the case will permit; (4) it must not contain impertinent matter; (5) it must set forth the defense which defendant wishes to introduce in evidence, for he will not be permitted to prove something of which he has not notified the plaintiff by his pleading. Thus, if his defense is fraud on the part of the plaintiff he must plead the ultimate facts to show the fraud. As the rule is generally stated, the pleading and proof must correspond.

85. **Objectionable answers.**—An answer may be objectionable upon any one of three grounds, namely,

[23] Miles v. Miles, 27 N. H. 440.

because some of its statements are either scandalous or impertinent, or because it is insufficient in not answering fully the statements of the bill.

Scandalous or impertinent statements will be expunged upon exception taken thereto, or, in the federal court, on motion to strike out, specifically pointing out the objectionable matter. Objections for insufficiency are not made by demurrer, as in pleading at common law, but by exception for such insufficiency.[24]

86. **Irrelevant facts.**—In equity pleading, facts which are not relevant to the cause of action or discovery sought in the bill, or to the defense or to the discovery made by the defendant in his pleadings appropriate to defense or to discovery, should not be contained in the pleading and may be expunged after proper and timely application to the court.

Such irrelevant facts are of two classes, namely, those that are scandalous and those that are impertinent. The first consists of such facts as are unnecessary to state the cause of action, or the discovery sought, or the defense, or the discovery given, and which also reflect upon the character or reputation of the other party or of some third person. The second likewise consists of facts unnecessary or useless for the purposes of the suit.

87. **When answer is not binding upon plaintiff.**—An answer under oath is not binding upon plaintiff so as to require him to overcome it, in the following instances:

(1) As to new facts stated to avoid or discharge

[24] Story, Equity Pleading (10th ed.), §§ 861-864.

the case made by the bill; (2) when the matters stated in the answer are absurd or contradictory in themselves, or are such as make the facts stated in the bill more probable; (3) when the answer is not direct, positive, and unequivocal, in its denials or explanations; (4) when on information and belief only; (5) when the answer itself shows, or it is apparent from the situation of the defendant, that he swears to matters of which he cannot have personal knowledge; (6) when the answer is discredited as to one point, and the effect of the facts as to other points is impaired or destroyed, according to the circumstances of the case; (7) when the defendant professes ignorance of any or all of the matters stated in the bill, the plaintiff, at most, is required only to prove such matters; (8) when the answer denies legal conclusions.[25]

88. **Effect of the plaintiff's waiver of oath.**—The power of the plaintiff to compel the defendant to answer without oath is not uniformly established. Indeed, it may be said that the general rule is that such a waiver is not binding upon the defendant and that he may nevertheless answer under oath and thus make discovery, which, if favorable to him, must be overcome by the plaintiff.[26] But in some states, by statute or practice, the rule is the contrary.[27]

89. **When the answer is not under oath.**—The authorities have not clearly established the effect of the answer when it is not under oath but is yet responsive to facts charged in the bill. If the facts

[25] Story, Equity Pleading (10th ed.), § 849, note b.

[26] Story, Equity Pleading (10th ed.), § 874, note a, and cases cited.

[27] Same.

discovered are favorable to defendant and are responsive to the bill, it is not clear that he should not have the benefit of them, particularly when the opposing evidence of the plaintiff is either defective, obscure, doubtful, or unsatisfactory.[28] But clearly, if the answer is favorable to the plaintiff, it should have the effect of an admission against the defendant. Such facts are binding upon the defendant because he states them. For the same reason, all facts asserted or admitted by him, whether by way of discovery or as new facts stated to confess and avoid the case made by the bill, are likewise binding.

90. **Effect of answer.**—When the bill requires the defendant to discover under oath as to facts stated or charged, the facts discovered in the answer are binding upon both parties to the following extent and under the following circumstances: They are binding upon the plaintiff to the extent that they are directly responsive to the facts called for by the bill, when the facts discovered are directly and positively asserted. But they are not conclusively binding upon the plaintiff. He may overcome them by the testimony of two or more witnesses, or of one witness and strong circumstances in corroboration.[29] They are binding because plaintiff called for them; they are not conclusively binding for the reason that this would be unfair to plaintiff, since it would place him at the mercy of the defendant.

91. **Answer in support of the plea.**—The answer in support of the plea is no part of the defense, but

[28] Story, Equity Pleading (10th ed.), § 875, note a.
[29] Moors v. Moors, 17 N. H. 481.

is properly a discovery of that evidence which the plaintiff rightfully requires by his bill in order to invalidate the defense made by the plea. Under the practice, the plea may be set down for argument as to its sufficiency and the statements made in the answer as discovery to the evidentiary facts charged in the bill are taken as true at the time of the argument. If, therefore, they show that the defense set up in the plea is not true, or is avoided, then the defense is invalidated thereby. An able writer has explained the matter substantially as follows: It is the right of the plaintiff, as a general rule, to examine the defendant upon oath as to all matters of fact, well pleaded in the bill, which are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit. Ordinarily, the answer, if one is made, consists of two parts: (1) the defense upon the merits of the case stated; and (2) the defendant's discovery as to the facts about which he is interrogated; or, in other words, his examination on oath as to all the material (ultimate) facts of which a discovery is sought.

In such a case, the examination is merely evidence in the cause, and is altogether independent of the matter of the defense. Now, if, instead of a general answer, the defendant should put in a plea negativing the material (ultimate) facts on which the claim for relief is founded, if there were no accompanying answer, which should contain a discovery and response to the facts charged in the bill, the plaintiff would be deprived of the very discovery sought and perhaps also of all the proof which he

could bring forward to sustain the allegations of the bill. The answer, therefore, is strictly in support of the plea, and, also, proof to the discovery of which the plaintiff is entitled notwithstanding the plea. The plea, without it, cannot correctly be said to be a complete answer to the bill, for, although it repels the facts stated by the plaintiff, it does not repel the right to a discovery of the facts from the conscience of the defendant.[30]

92. **When no answer is required.**—No answer is required unless the bill charges specific facts to which the answer is a proper response, and this charge may be made in either of two ways, namely, either by stating a particular fact and charging that the evidence thereof is in the possession of the defendant, or by a general fact, such as that upon which the title of the plaintiff is founded, and charging particular facts to prove the general fact, and requiring discovery thereof from the defendant. Unless the defendant is distinctly informed of the particular matters affecting the ultimate fact or facts as to which the plaintiff seeks discovery, the defendant does not know what he is to answer and, therefore, is not required to answer at all.[31]

4. The Cross-Bill.

93. **Definition.**—The defendant may have a claim against the plaintiff or a co-defendant growing out of the same matter or of a similar nature, or he may wish some affirmative relief in his favor. For this

[30] Wigram, Discovery (1st ed.), pp. 10-13; same (2d ed.), pp. 10-11.
[31] Story, Equity Pleading (10th ed.), §§ 681, 682.

purpose, he must file a pleading called a cross-bill, in which he is the plaintiff and the other parties are defendants. It does not make a new suit, being only auxiliary. New matters and new issues germane to the original bill are thus set up, but if the purpose of the cross-bill be different from that of the original bill, it cannot be maintained. Briefly, it is used, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.[32]

Under the new rules, in the federal courts, matters formerly set up in the cross-bill are now raised by answer.[33] If the counter-claim arises out of the same transaction, it must be stated in the answer; if the claim is such as may be set off against the plaintiff or is a counter-claim which might have been the subject of an independent suit against the plaintiff, it may be brought in by the answer instead of by cross-bill.

[32] Simkins, Federal Suit in Equity (2d ed.), pp. 469-471.
[33] New Federal Equity Rules, rule 30.

CHAPTER III.

AMENDMENTS, SUPPLEMENTAL PLEADINGS, JUDGMENTS PRO CONFESSO, AND DECREES.

94. **Amendments—In general.**—Courts of equity seek the substantial merits of the case. Therefore, they will overlook mere formal defects unless timely attention is called to them, or will allow amendments to be made.

Substantial defects may be amended if the cause is in such a stage that the rights of the adversary party will not be substantially prejudiced thereby and inconvenience will not be occasioned the court. No uniform rule can be stated, as the matter rests in the sound discretion of the court, dependent upon the circumstances of each case.[34]

95. **Amendments of the bill.**—Greater indulgence is allowed the plaintiff than the defendant in the matter of amendments because mistakes are more likely to occur in getting the facts of the plaintiff's case.

Amendments may be allowed in order to add a proper party, to change or enlarge the prayer for relief, to add some fact or circumstance omitted by excusable oversight or through excusable ignorance of the existence of the fact, or because of facts pleaded in the answer.

But the plaintiff will not be permitted to make a

[34] Hardin v. Boyd, 113 U. S. 756, 761.

new case.[35] In bills for an injunction, the rule is stricter than is usual, for the plaintiff must swear to his amendment as well as show an excuse for not having incorporated it in the bill.[36]

Special replications having been abolished in most jurisdictions, when the plaintiff desires to confess the existence of the facts stated in the answer and to avoid their legal effect by stating other facts not yet in any of the pleadings, he may obtain permission to amend his bill and anticipate the defense set up in the answer. This, as has been stated, is done in the charging part of the bill, where the plaintiff then anticipates the defense by stating the new facts.[37]

96. **Amendments of defendant's pleadings.**—Defendant may amend his pleading, but this is allowed with much more caution than in the case of the plaintiff.[38]

Since a demurrer is never good in part and bad in part, raising, as it does, a single point of law, it is rare that it is possible to amend it. But the court may, upon proper terms, allow it to be narrowed by an amendment.[39]

With respect to pleas, amendments may be made in case of evident mistake when the defense seems to be sufficient.

But in case of answers and pleas made under oath, amendments are not easily granted, since statements

[35] Verplanck v. Mercantile Insurance Co., 1 Edw. Chan. 84 (N. Y.).
[36] Same.
[37] Connorton v. Miller, 41 Mich. 1.
[38] Story, Equity Pleading (10th ed.), § 894.
[39] Same.

made under oath should be carefully considered before being made. When granted, amendment will be only for an obvious mistake in dates or omission of a fact through inadvertency.[40]

97. **When amendments may be made.**—Amendments of formal defects may be allowed at any time, but they may be refused where delay will result. After answer, amendments of the bill are more rarely permitted. But after the examination of witnesses, the pleadings are not altered or amended except under very special circumstances, or in consequence of some subsequent event, unless it be for the sole purpose of adding parties.[41]

At the final hearing, amendments may be allowed when necessary to substantial justice. After decree, amendments are not often allowed except to correct a clerical error.

In the federal courts, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, pleading, proceeding or record to be amended, or material supplemental matter may be set forth in an amended or supplemental pleading.[42] Before defendant pleads, plaintiff may amend without application, but after defendant's pleading is filed, he must obtain defendant's consent or leave of the court.

98. **Supplemental pleadings.**—Where the imperfection in the original bill arose from the omission of some material fact which existed at the time of

[40] Smith v. Babcock, 3 Sum. 583 (U. S.).
[41] Thorn v. Germand, 4 Johns. Chan. 363 (N. Y.).
[42] New Federal Equity Rules, rule 19.

filing of the pleading, the omitted fact is added by amendment, provided the plaintiff makes his application in time and shows that the fact was not known to him at the time and was not discoverable by the exercise of due diligence. But facts which originate after the pleading was filed and which are material to the cause, such as a new party to whom rights have accrued touching the subject matter of the controversy, may be added by a supplemental pleading; and, sometimes, facts which existed prior to the filing, but which could not have been discovered by due diligence, may be added by supplement, when the time for amendment has passed.

But the new facts must not change the rights and interests of the parties, though they may change the relief prayed in the original bill.[43]

99. **Exceptions.**—An exception to an answer for insufficiency is made in writing, stating specifically the parts of the bill which are claimed not to be answered, and praying that the defendant be required to answer fully. It must be signed by counsel and delivered to the proper officer within a limited time allowed therefor. Where there are several defendants and each has answered separately, separate exception must be taken to each answer; but if there is a joint answer, but one exception need be made. All grounds of objection for insufficiency should be made in the exception, for if the defendant amends or files a new answer to a new bill which plaintiff took leave to file after his exception was allowed, plaintiff will not be permitted additional

[43] Story, Equity Pleading (10th ed.), § 336.

grounds of insufficiency, since the objections should have been made before.[44] In the federal courts, objections, formerly made by exception, are now made by motion.

100. **Hearing on exceptions.**—If the defendant believes his answer sufficient, the determination of the matter is referred to an officer of the court called a special or general master, who looks into the bill, answer and the exception, and makes a written report thereon. If the report decides the answer insufficient, the defendant must answer again with a corrected answer; but if he conceives the answer to be good, he takes an exception to the report and thus brings the matter before the court for his ruling thereon.[45]

Under the federal practice, the motion to dismiss or other appropriate application is heard by the court, as a general rule, references now being unusual, save in matters of account.[46]

101. **Judgment pro confesso.**—The defendant has the option of making a defense. If he does not, he will not be able to prove any at the hearing. But he does not thereby impliedly admit the existence of the ultimate facts stated in the bill to show the cause of action. However, his failure to plead places him theoretically in contempt of the court and the practice arose to hold not only that he is contumacious but that upon application by the plaintiff the court will order that the facts showing the plain-

[44] Story, Equity Pleading (10th ed.), § 864.
[45] Story, Equity Pleading (10th ed.), § 865.
[46] New Federal Equity Rules, rule 59.

tiff's cause of action shall be taken as true. Judgment pro confesso is then taken against him and the court proceeds to give the plaintiff such a decree as the ultimate facts of his bill will warrant without proof of their existence. If the bill does not state a cause of action, the decree, which is the formal judgment of the court, cannot be granted. If it does, the decree does not, however, give the facts sought to be discovered, for these are within the conscience of the defendant and are unknown to the court and the plaintiff. But the judgment pro confesso only goes to the equity of the bill and does not extend to the items sought. Thus, upon a bill for an accounting, the judgment is that plaintiff is entitled to an account, but it does not relieve him of the necessity of showing the amount due him, even though he may have fully set forth in his bill what he claims to be the true state of the accounts. At the hearing before the master, or court, he must offer proof, and the defendant has the right to appear and contest the amounts of the claims. The consequences of the failure to plead in equity, therefore, are the same as at law but not for the same reasons.[47]

102. **Decrees.**—During the progress of the case, the court may make an order as an additional step toward a final determination of the merits. Such an order is termed an interlocutory decree. But if the issues of the case are determined, and, without further judicial action, the rights and liabilities of the parties fixed, a final decree is entered; after that, the court has no more control over the decree, except

[47] Langdell, Equity Pleading (2d ed.), § 84.

o make such orders as may be necessary to enforce
t. On the other hand, an interlocutory decree is
nder the control of the court and may be modified
r set aside at any time and at any term until final
ecree. An appeal to the higher courts may be taken
rom a final but not from an interlocutory decree.

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QUIZ QUESTIONS*

EQUITY PLEADING

(The numbers refer to the numbered sections in the text.)

1. What is the nature and function of a court?
2. Define jurisdiction.
3-4. (a) Define equity pleading. (b) What relationship does it bear to equity jurisdiction? (c) Into what classes is equity pleading divided?
5. Trace the history of equity pleading.
6. (a) Define complainant, plaintiff, grounds of suit, cause of action. (b) A files a bill in equity asking that a horse be replevied. What will the court do with the prayer? Why?
7. Distinguish between and define ultimate facts, conclusions of law, pleadable facts, operative facts.
8. What is the issue of facts?
9-10-11. How must facts be stated? Give examples of violations of the rules stated.
12. Is there any difference as to strictness between common law and equity pleading? If so, state it.
13. Of what matters is the plaintiff relieved in stating his cause of action?
14. How may impertinent matter be removed? What is the federal rule on this point?
15. What is scandal, and what remedy does the court possess to expunge scandal?
16. What is an evidentiary fact? How does it differ from an ultimate fact?
17. In a bill for divorce, the complainant states that "B committed repeated acts of cruelty." A statute provides that "repeated acts of cruelty" shall constitute a ground for divorce. Is the statement a conclusion of law?

* Prepared by the editors.

18-19. When does a bill of discovery lie? How is discovery stated?

20. Give rules of construction of pleadings in equity.

21-22-23. When and where may an alien not sue in a court of equity?

24. What exceptions existed to the general equity rule as to equity suits by married women?

25. A, an idiot, seeks to file a bill in equity. Who must be a party with him?

26-27. If an infant sues for specific performance, must he have a next friend? Is the same true, where he is sued?

28-29. (a) Into what classes are parties divided in equity? (b) Why does equity seek to avoid a multiplicity of suits?

30. State the exceptions to the rule that all interested persons should be made parties to an equity suit.

31. Distinguish between a bill and an information.

32. Are bills of discovery used frequently in practice? Why?

33. Name and describe the formal parts of a bill.

34. What is a verification?

35. What rules apply as to the stating part of a bill?

36. For what purposes is the charging part of a bill used?

37. A, the complainant, includes interrogatories in his bill against B, the defendant, requiring answers of C. Is this proper?

38. What is the address? Give examples.

39-40-41-42. Draw a bill including all of its parts.

43. What is the subpœna in the bill?

44. To what does an attorney certify when he signs a bill? Who verifies the bill?

45. What is meant by the joinder of causes of action?

46. Distinguish between multiplicity of suits and multifariousness.

47. Give an example of a bill with a double aspect.

48. Of what service is the replication?

49. Name the defendant's pleadings. What exceptions are there in the federal courts?

50. Does a demurrer to a bill differ from a demurrer to a declaration?

51. If a demurrer is overruled, what is the next step for the defendant?

52-53. Name and define the kinds of demurrers. For what purposes are they filed?

54. Give the grounds for a demurrer.

55. What facts are admitted by a demurrer? If the demurrer is overruled, and the defendant answers, what facts are admitted at the trial?

56. Define a plea.

57. Give the purposes of a plea.

58. Explain the phrase, "the plea must be single."

59-60. State when a multifarious plea is allowed.

61. Distinguish separate pleas to separate parts of a bill from multifarious pleas.

62. What rules apply to the statement of a plea?

63. Give the three bases for the classification of pleas, and the elements of the classes.

64-65-66. Distinguish between pure, anomalous and negative pleas.

67. What limitations exist with reference to the negative plea?

68. What pleas are to the essentials of a bill?

69. Divide pleas to the jurisdiction into classes.

70. What do pleas to the person attack?

71. Distinguish pleas to the frame of the bill from the other pleas discussed.

72. A sues B in equity in Chicago and also in Evanston, both being cities in the same county in Illinois? Is this proper?

73. How may the defendant attack a defect of parties in an equity suit?

74-75. How may multiplicity and multifariousness be attacked?

76. Name and define the pleas in bar.

77. What is meant by the determination of the plea?

78. What are the rights of the defendant: (a) where he proves the facts in his plea; (b) where the plea is overruled; (c) where the plea, although a defense, has been informally pleaded?

79. Where does the defendant file an answer?

80-81. What is the office of an answer and what must it meet?

82. What is meant by the phrase, "knowledge, information and belief"?

83. Give the rule as to answering interrogatories.

84. What general rules of pleading apply to answers?
85. An answer to a bill for divorce attacks the character of the complainant. Is it objectionable?
86. What are irrelevant facts? If objectionable, how removed?
87-88-89-90. Explain the effect on the plaintiff of an answer under oath and of an answer not under oath. Does a waiver of the oath by the plaintiff affect the rules?
91. What is an answer in support of the plea?
92. When is it unnecessary to answer?
93. Explain the use of a cross-bill.
94-95. When may a bill be amended?
96. What are the defendant's rights of amendment?
97. May an amendment be made after a final decree? Why?
98. Distinguish between an amendment pleading and a supplemental pleading.
99-100. What are exceptions? When are they heard?
101. Explain the procedure to obtain a judgment pro confesso.
102. What is an interlocutory decree? A final decree?

PART IV

EXTRAORDINARY REMEDIES

BY

HARVEY NEWTON SHEPARD, A. B.*

THE REMEDIES IN GENERAL

CHAPTER I.

DEFINITIONS, ANALOGIES AND HISTORY.

1. **The purpose of the remedies.**—The important extraordinary legal remedies at common law are mandamus, prohibition, certiorari, quo warranto, and habeas corpus. Mandamus is a writ which is issued to a court, a tribunal, a corporation, or an officer, commanding the immediate performance of an official duty; as, for instance, that a water company shall supply water to the petitioner, upon the same terms as those under which the company supplies it to others.[1] Prohibition is a writ which is issued to a court, or other judicial tribunal, forbidding it to go on in some matter, which is beyond its jurisdic-

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[1] People v. N. Y. Sub. W. Co., 56 N. Y. S. 364.

tion; as, for instance, that a coroner shall not hold an inquest as to the origin of a fire. Certiorari is a writ which is issued to a court, or other judicial tribunal, which does not proceed according to the common law, requiring it to certify and send up the record in a specified cause, so that its errors may be corrected; as, for instance, that the order of a city council, authorizing a highway to be laid out fifty feet wide, when it had power to lay it out only forty feet wide, shall be declared illegal. Quo warranto is an information against a corporation, or officer, to inquire by what warrant a public office, or franchise, is held; and to correct the usurpation, wrong use, or want of use, of such office, or franchise; as, for instance, to test the title of one who is acting as mayor of a city. Habeas corpus is a writ which is issued to a person, who detains another person in custody, commanding the former to have the body of the latter before the court, at a specified time and place; as, for instance, to test the validity of the arrest on civil process of a witness before a committee of the legislature.

2. **Not used in equity.**—Although there are traces of a practice, in the early English cases, to issue some of these writs in equity, now, in Great Britain, and in nearly all the United States, they are issued only at common law; and it is held by the Supreme Court of the United States[2] that to treat a petition in equity as a petition for the writ of mandamus "would ignore the well established principle of the federal courts that the line between the equitable

[2] Heine v. Levee Commissioners, 19 Wall. 655 (U. S.).

and common law jurisdictions must be maintained, and that a suit must be of the one character or the other, and be prosecuted by pleadings and processes belonging to each class of jurisdiction."

3. **Equitable analogies—Clean hands.**—Nevertheless, two important equitable principles apply to these extraordinary remedies, although they are not applicable to ordinary remedies at common law. For instance, the petitioner for an extraordinary remedy must come into court with clean hands. When, therefore, a telephone company refused service to a bawdy house, the court dismisses a petition for mandamus to compel the company to furnish the service, since to allow it would assist a criminal act. In Board of Supervisors v. Magoon,[3] the court dismisses Magoon's petition for certiorari to the supervisors, who had altered a road upon his land, although the action of the supervisors was illegal, because he had urged all their acts, and never claimed them to be illegal until they made a decision against him. In Whateley v. Franklin,[4] the court dismisses a petition for prohibition against the commissioners who had made repairs upon a town road, upon the representation by the town of Whateley that it was a county road or public highway, since "the effect of quashing the proceedings would leave Whateley in the full enjoyment of all the repairs and yet discharge them from paying for these expenditures."

4. **Same subject—Laches.**—The petitioner also must come into court promptly, although laches is

[3] 109 Ill. 142.
[4] 1 Metc. 336 (Mass.).

not an absolute bar, but is addressed to the discretion of the court; and the writs will be awarded or refused as the circumstances of each case may require. In Hill v. Mayor of Boston,[5] as to mandamus to the mayor to recognize the petitioner as the messenger of the printing department and to place his name upon the pay roll of the city as such messenger, the court says: "No precise definition can be formulated as to what is sufficient to constitute want of diligence, but at law, upon a petition for mandamus, as well as upon a bill for equitable relief, this question must depend upon the circumstances of each particular case." It is held in Illinois that laches is not a bar, if the petition be prior to the time which is fixed by the Statute of Limitations in similar circumstances. But, usually, if the neglect of the petitioner to assert his rights is an injury to others, as when the neglect has induced others to expend labor or money, it is within the discretion of the court to deny the writ, although the delay has been for a period less than that fixed by the Statute of Limitations in similar circumstances. Since a quo warranto, when filed by the attorney-general, is the act of the crown in Great Britain, and of the state in this country, laches on his part is no bar, in conformity with the maxim: *Nullum tempus occurrit regi* (No time runs against the king). In Pennsylvania, Indiana, Missouri, and Minnesota, however, there is no difference in this respect between the attorney-general and a private petitioner; and in Illinois, the court distinguishes between those cases

[5] 193 Mass. 569.

here the object is to enforce a private right and ose to enforce a public right. Acquiescence in the ts complained of may be a bar, even against the ttorney-general.

5. **Origin of mandamus.**—Mandamus originally as an order, or mandate, of the king; and it was s exclusive prerogative, directing obedience to the w, not necessarily as it had existed, but as the andate itself then declared it to be. In other words, was the command of an autocrat, whose will, when expressed, became the law, from which there was o appeal. By the time of Edward II, however, it ad become a judicial writ; but now it confers no ew authority, and lies only to compel a man to do at which it is his duty to do without it.[6]

6. **Origin of prohibition.**—Prohibition grew out the number and the variety of the early English urts, with no strict lines of jurisdiction, so that ten there was a scramble on the part of the judges obtain control over controversies. It was even a axim that it was "the duty of a good judge to nlarge his jurisdiction"; and a powerful motive was n increase, by this means, of judicial fees, so that n some cases men who had no judicial authority at ll would usurp judicial power and set up a court. ince it was essential to the power of the king to eep these courts to their appropriate duties, and o rule out usurpations, there arose, as matter of ecessity, the writ of prohibition, whereby any man xercising judicial power could be compelled to show is authority. It was such a writ which, in 1340,

[6] Taxing Dist. v. Logue, 129 U. S. 493.

brought before the king's justices the greatest subject of the realm, the Archbishop of Canterbury, who persisted in holding in an ecclesiastical court a man to be tried for slander, who, under the common law, was entitled to be tried by a jury in a common law court. The writ of prohibition was the strong right arm of the government; and without it England might have been an aggregate of counties, instead of a powerful and consolidated nation. With it, the feudal lords could not maintain against the king their local courts and tribunals. The writ now restrains not only inferior courts, but other tribunals and officials charged with a duty only in part judicial, or not strongly marked with a judicial character.

7. **Origin of certiorari.**—The Court of King's Bench, which was divided into a crown side and a plea side, took cognizance, on the crown side, of all criminal causes; and all indictments might be removed into this court by certiorari, to consider the validity of the indictments: where insufficient trial would be had in the court below; in order to plead the king's pardon; or to issue process of outlawry against the offender in those counties where the process of the court below would not reach him. The scope of the writ then was limited at common law to remove criminal causes from inferior tribunals to the Court of King's Bench.[7] Subsequently its operation was changed in England by several acts of Parliament, and in the United States by legislation in most of the states, so that now it rarely is used in a criminal cause; and in civil causes its scope has

[7] Commonwealth v. Balph, 111 Pa. St. 365.

en enlarged, so that, whenever a new tribunal, nknown to the common law, is created by the legis- ture, if the law provides no appeal, certiorari is the ppropriate remedy to correct its errors.[8]

8. **Origin of quo warranto.**—The earliest use of a rit of quo warranto upon record, in the ninth year Richard I, A. D. 1198, is against the incumbent of church. It was employed frequently by Edward I strengthen the crown against the barons.[9] The ecise time when the writ fell into disuse, and its ace was taken by an information, in the nature of quo warranto, is not known.[10] Blackstone says: The judgment on a writ of quo warranto, being a rit of right, is final, even against the crown. Which, gether with the length of its process, occasioned at disuse into which it is now fallen, and intro- uced a more modern method of prosecution, by infor- ation filed in the Court of King's Bench, by the torney-general, in the nature of a writ of quo war- anto, wherein the process is speedier, and the judg- ent not quite so decisive." Whatever the causes hich led to the substitution of the information for e writ, it is now the usual process.

The writ was a civil proceeding. The information as a criminal proceeding, in which the usurpation the office or franchise was charged as a criminal ffense, and the offender was liable to a fine and im- risonment, in addition to the loss of the office or anchise. But the criminal character of the infor-

[8] Stone v. New York, 25 Wend. 157 (N. Y.).
[9] People v. B. & R. Turnpike Co., 23 Wend. 222 (N. Y.).
[10] State v. W. W. Ry. Co., 34 Wis. 197.

mation disappeared in England long ago in everything except in form, the fine being nominal only; and such always has been its character in most of the United States. But in Illinois[11] the same certainty and technical precision are required in a quo warranto information as in an indictment for crime. In Idaho also the criminal features are emphasized. In Tennessee neither the writ nor the information has been adopted, the remedy for the usurpation of an office or franchise being in equity. In New York the writ and information are abolished by the code of procedure, and relief is obtained by a civil action; but it is the form only of the proceeding which has been abolished, both the jurisdiction of the courts and the substance of the remedy remaining unchanged.

In most states the jurisdiction is fixed by constitutional provisions, prescribing the courts, usually the supreme courts, empowered to grant the relief; and it is held that the clause of the Constitution conferring the power to grant writs of quo warranto means the quo warranto information, and that to this reference must be had, in determining the powers of the court, rather than to the writ of quo warranto. It also is held that it is not necessary that the legislature should prescribe any particular mode of procedure, and that, in the absence of any such mode, the court will proceed in conformity with common law usages.

9. **Origin of habeas corpus.**—The right to freedom from restraint, without regular process, had existed always at common law, and traces of the

[11] Donnelly v. People, 11 Ill. 552.

existence of this writ are found in the Year Book, 28 Edward III, 22; and it was affirmed by Magna Charta. Nevertheless, arbitrary imprisonment was practiced both by kings and courts. Those by the privy council and crown officers, under Elizabeth, gave rise, in 1591, to an impressive address from the common law judges to Chancellor Hatton and Lord Burleigh; but in 1627, when certain knights were imprisoned by the king, for not yielding to a forced loan, the Court of King's Bench refused to bail them upon habeas corpus, though no cause, other than the king's command, was returned. After a long interval, there came the Petition of Right, a parliamentary declaration of the liberties of the people, assented to by Charles I, in the beginning of his reign. This was followed by more ample concessions from that king, and by the habeas corpus act under Charles II.

The colonists in America regarded the writ as one of their dearest birthrights, and it was resorted to frequently. The denial of it in Massachusetts, by Judge Dudley, in 1689, to Rev. John Wise, imprisoned for resisting the collection of a tax, was made the subject of a civil action against the judge, and the act was denounced in a pamphlet, published in 1689, on the authority of "the gentlemen, merchants, and inhabitants of Boston and the country adjacent." In New York, in 1707, the writ released the Presbyterian ministers, Makemie and Hampton, from an illegal warrant, issued by Governor Cornbury, for preaching the gospel without license. In New Jersey, in 1710, the assembly denounced one of the

judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In the assembly of Maryland, in 1725, the benefit of the writ's provisions was claimed, independent of royal favor, as the "birthright of the inhabitants." The refusal of Parliament, in 1774, to extend the writ to Canada, was denounced by the Continental Congress, in September of that year, as oppressive; and subsequently this was recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies.

CHAPTER II.

PRACTICE AND PLEADINGS.

10. **How and when proceedings begin.**—Proceedings begin with a motion for leave to file a petition; except that, in Great Britain and in most of the United States, a quo warranto information, by the attorney-general, may be filed without leave of court; though, in some states, if the attorney-general merely allows the use of his name, as is sometimes done, the information cannot be filed without leave of court. A petition for certiorari generally will lie only after final adjudication; but it is held in Massachusetts[12] that this principle is not applicable to the writ when designed for the review of municipal proceedings, in which case the time for its allowance is discretionary. A petition for prohibition, on the other hand, generally will lie only before a final adjudication; except that, where the want of jurisdiction appears on the face of the proceedings, prohibition will lie after judgment, if anything remains to be done. The petition sets forth such facts as prima facie entitle the petitioner to the relief which he seeks; and in many states it must be supported by affidavit. It concludes with a prayer for an order, or rule, to the respondent to show cause why a writ should not issue. The service of notice upon the respondent suspends the proceedings of which the petition complains, though

[12] Hancock v. Boston, 1 Metc. 122 (Mass.).

in Henry v. Steele[13] the court refuses to hold the judge of the inferior court in contempt for proceeding after notice of a petition for prohibition, but questioned the propriety of his action.

11. **Demand and refusal.**—Mandamus is not granted in anticipation of the omission of a duty, but only when the time has come for the performance and the duty has not been performed; and if the duty be of a private nature, previous to making application for the writ, an express and distinct demand, designating the precise thing required, must have been made by the petitioner upon the respondent; and it must appear that the respondent refused to comply with such demand, either in direct terms or by conduct[14] from which a refusal can be inferred; but if the duty be of a public nature, and due to the petitioner in the same way in which it is due to every other citizen, "the law itself stands in lieu of a demand, and the omission to perform the required duty, in place of a refusal." Prohibition[15] also is not granted in anticipation that the respondent will do something which he ought not to do. Likewise if the objections were not raised before the inferior tribunal, the petitioner cannot seek redress by certiorari,[16] because the writ is not granted to review those matters which might have been, but were not, objected to in the court below. Although the rule is the same when the petitioner seeks redress by prohibition, there is an exception in favor of persons

[13] 28 Ark. 455.
[14] Attorney General v. Boston, 123 Mass. 460.
[15] Prignitz v. Fischer, 4 Minn. 366.
[16] Cousins v. Cowing, 23 Pick. 208 (Mass.).

whose interest entitles them to the writ, but who, owing to their not being parties to the suit below, had no opportunity to make objection. Prior objection is unnecessary if the tribunal had no jurisdiction.

12. **Who may be the petitioner.**—These writs formerly were not writs of right, but purely prerogative writs, issuable only at the pleasure of the sovereign, and therefore only in his name; and even now, in some instances, while the writs may enforce a private interest, unconnected with any public interest, the fiction of a public interest is retained, and then the proceedings begin in the name of the sovereign,[17] upon the relation of the party aggrieved, who must show some personal interest,[18] though the interest may be slight;[19] and sometimes the fact that he is a citizen,[20] and, as such, interested in the execution of the laws, is enough. If, however, the right to be enforced is private and personal, then the state must not be used as a petitioner.[21] A petition for mandamus[22] may be brought by anyone having a private right for the enforcement of which the law provides no other adequate remedy; and a petition for prohibition[23] against a court acting without jurisdiction may be filed at the instance of any one of the parties, or even of a stranger. In Maine, Massachusetts, Minnesota, and some other states, only a party

17 State v. Commissioners, 5 Ohio St. 497.
18 People v. Crotty, 93 Ill. 180.
19 State v. Francis, 95 Mo. 44.
20 People v. Sub. R. R. Co., 178 Ill. 594.
21 Morris C. & B. Co. v. State, 14 N. J. L. 411.
22 McCarthy v. Boston, 188 Mass. 338.
23 Trainer v. Porter, 45 Mo. 336.

to the record can obtain the writ of certiorari. But in other states[24] it is sufficient if the petitioner be interested in the subject matter upon which the record acts. In Missouri, after the attorney-general and the prosecuting attorney of the county have refused to act, a writ of certiorari may be granted, upon the application of a taxpayer of a township, to revise the action of the county court in granting a license to keep a dramshop in such township. It is held in most states that individuals cannot use quo warranto, either of right or by leave of court. But in Connecticut, Missouri, Georgia, Colorado, and New Jersey, it is held that any citizen or taxpayer has sufficient interest to enable him to maintain quo warranto proceedings to oust the unlawful incumbent of a municipal office; and in Massachusetts, any person whose private right is put in hazard by the exercise of a franchise not conferred by law may apply to the supreme judicial court for leave to file an information, and judgment may be entered that the corporation be excluded from the exercise of such franchise. A petition for habeas corpus may be filed, not only by the person under arrest, but also by any other person who has an interest in the prisoner,[25] as for instance by the master, when his apprentice is a prisoner, and by parents and guardians, when a minor is a prisoner. Yet, as in such cases the proceeding is to remove restraint, rather than to enforce the claim of private custody, the prisoner, if an adult of sound mind, generally is permitted to go at large;

[24] Dexter v. Cumberland, 17 R. I. 222.

[25] Commonwealth v. Harrison, 11 Mass. 63.

if an infant of discretion, to elect in whose custody he will remain; and if of tender years, without such discretion, the court determines the custody, according as the infant's welfare may at the time require; the petitioner cannot control the proceedings, and cannot appeal from the decision of the court.

13. **Who may be the respondent.**—If the duty is imposed on a particular officer of a corporation, the party seeking to have the duty performed must proceed against that officer; he cannot proceed against the corporation as such to compel it to perform the duty; nor can he proceed against the corporation to compel it to coerce the officer; and, where the power and duty are lodged with the governing body, the petition is directed to such body and not to the municipality in its corporate name. Mandamus directed to the "mayor and aldermen" of a city, if they constitute the government of a city, is correct, although the city is incorporated under a name, and has power to sue and be sued. The respondent named in a petition for prohibition is the inferior court,[26] in which the suit is pending; and it is the better practice[27] that the other parties to the suit be joined also as respondents. If, however, the suit complained of is brought by the government, then the only respondent is the court.[28] In People v. Spring Valley,[29] Mr. Justice Magruder says: "When an existing corporation abuses any of its franchises, or usurps franchises which do not belong to it, the information

[26] Conn. River R. R. Co. v. Franklin, 127 Mass. 50.
[27] London v. Cox., L. R. 2 H. L. 239 (Eng.).
[28] Smith v. Whitney, 116 U. S. 167.
[29] 129 Ill. 169.

should be against the corporation as such. But when a number of individuals unlawfully assume to be a corporation, the information should be against them as individuals, and not by their corporate name." So, in People v. R. & S. Railroad Co.,[30] the court says: "If the information had for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been filed against individuals; if the object was to effect the dissolution of a corporation which had had an actual existence, or to oust the corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation. When an information is filed against a corporation by its corporate name, the existence of the corporation is admitted; or, rather, that it once had legal existence." This rule which makes the joinder of a corporation as a party respondent an admission of corporate existence does not apply to municipal corporations, since it would be impossible to make every inhabitant a defendant. Where, then, the object of the proceeding is to try the title of persons assuming to be the officers of a pretended municipality, on the ground that its organization is invalid, such pretended officers should be made respondents, without joining with them the alleged corporation. Where a continuing duty is incumbent upon certain public officers, and the object of proceedings is to enforce a right against the community, through such officer, the action is regarded as being against the office, to compel the performance of a duty devolving

[30] 15 Wend. 114 (N. Y.).

upon it,[31] regardless of the incumbent; and so, when it is the duty of a county clerk to report all fees received during his term of office, and to pay into the county treasury the excess of money thus received above that which he is entitled to retain for his services, this duty may be enforced by mandamus, notwithstanding the expiration of his term of office.

14. **The alternative writ.**—If the petition be for mandamus, the courts in most states, in place of a rule to show cause, order an alternative writ to be issued, which commands the respondent to perform the act required of him, or show cause for not doing it. The alternative writ is looked upon in these states as the first formal pleading; and the petition, and the affidavits upon which the writ was obtained, are not considered a part of the record, and they cannot be used to support the allegations in the alternative writ. Therefore, the alternative writ must contain, specifically stated, all the averments of fact upon which the petitioner bases his right of action; and a mandatory clause should be added, specifically setting forth the thing required of the respondent. In Massachusetts and in Vermont, however, it is not the practice to issue an alternative writ, but to hear the merits of the case upon the petition and answer.

15. **The answer.**—Prior to the reign of Queen Anne, the return to the alternative writ, corresponding to the answer to the petition, was incontrovertible, and the remedy, if the return was untrue, was an action for damages. Now, however, both the petition and the answer, or the alternative writ and the return,

[31] Prescott v. Gonser, 34 Iowa 175.

are mere statements; and the petitioner may controvert the truthfulness of a return to an alternative writ by a motion to require the respondent to show cause why he should not be attached for contempt for disobeying the order of the court. Amendments, both to the petition and to the answer, are allowable at any stage of the proceedings. The respondent may claim a legal or an equitable excuse, and may rely upon facts which have occurred since the petition was filed. He also may demur to the petition; and, if an alternative writ has been issued, he may move to quash it, which motion is the same as a demurrer to the petition. The petitioner for habeas corpus, or the prisoner, may deny the facts as set forth in the return, or may allege any other material facts, in each case under oath; and this denial or allegation may be amended by leave of the court.

16. **An ordinary remedy a bar.**—Whenever there is open to the petitioner another adequate remedy, his petition for these writs will not be granted.[32] A petition, therefore, for mandamus, to compel a transfer of corporate shares, will not be granted, the court says in Stackpole v. Seymour,[33] if the petitioner can be indemnified by an action for damages; although in a similar case mandamus was granted in the Exchequer Chamber; but the judgment was reversed in the House of Lords.[34] A like petition, however, by the corporation itself, to secure to it the benefit of its organization, will be granted.[35] Quo warranto

[32] Re Chetwood, 165 U. S. 443.

[33] 127 Mass. 104.

[34] R. v. Shropshire Union Railways, L. R. 8 Q. B. 420; 7 H. L. 496 (Eng.).

[35] Amer. Ry. Frog Co. v. Haven, 101 Mass. 398.

will not lie against a turnpike company, charged with having opened its road through the petitioner's land, without agreeing as to the compensation, and without having the damages ascertained in the manner provided by law, since in such case the corporation is a trespasser, and relief may be had by an ordinary action. Also if an adequate review by appeal is open to the petitioner, a writ of prohibition will not issue.[36] Yet in M. & C. R. R. Co. v. Brannum,[37] where the railroad applies for certiorari, the court says: "By appeal from judgments of justices of the peace the case must be tried, de novo (anew), without regard to any defect in the summons or other proceedings before the justice. Such an appeal would have operated as a waiver of all defects in the summons, and would not be the ample redress necessary to be afforded by appeal in order to supply the place of the remedy by the common law certiorari." And in State v. Guinotte,[38] the court says: "It has been broadly stated that certiorari will not issue where remedy exists by either appeal or writ of error. But the statement, though frequently met with in text writers, and in some reports, is neither strictly true, nor accurate; there are marked exceptions. An adequate remedy is a remedy which is equally beneficial, speedy, and sufficient, and not merely a remedy which at some time in the future will bring about a review of the judgment in the lower court, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the

[36] State v. Cory, 35 Minn. 178.
[37] 96 Ala. 461.
[38] 156 Mo. 513.

inferior court or tribunal." In the fifth circuit of the United States the Circuit Court of Appeals issued a mandamus to the circuit judge to vacate a certain order, although the question might have been raised by writ of error, on the ground of expense and delay. And in R. v. L. & N. W. Ry. Co.,[39] Baron Pollock says there are many cases in which a prerogative writ ought to be granted for the purpose of speedy justice.

17. **A statutory remedy generally a bar.**—Whenever a specific remedy is provided by statute, resort must be had to it,[40] and not to an extraordinary remedy. But in California it is held that where a new right and a remedy for its invasion are comprised in the same statute, although individuals are confined to the statutory redress, this does not apply to the state; and that the two remedies are distinct: the one belonging to the individual, as a power granted, and the other to the people, in the right of their sovereignty.

18. **Another remedy must be adequate to be a bar.**—Though other remedies exist, if they are inadequate to afford the particular relief to which the party is entitled, the writs will issue. In Mobile & Ohio R. R. Co. v. Wisdom,[41] a petition for mandamus to compel the company to receive, in payment for passage over its road, certain tax receipts, the objection is made that, as the petitioner might have his action for damages, he cannot have mandamus; and the court says: "It is far from being clear that the remedy by action

[39] 2 Q. B. 512 (Eng.).
[40] R. v. Morton, L. R. 1 Q. B. 39 (Eng.).
[41] 5 Heisk. 125 (Tenn.).

for damages would be equivalent to a specific execution of the obligation." In Richmond Ry. & Elec. Co. v. Brown,[42] the court says: "In the case at bar the mandamus was sought to compel the plaintiff in error to transfer the defendant in error from one to another of its street cars, without additional charge. If the defendant in error was entitled, as alleged, to the transfer, it is manifest that a suit at law for the damages for a failure to perform that duty was not an adequate remedy, and would not actually compel the performance of the duty in question. The wrong suffered was a constantly recurring and continual one, and, whatever may have been the result of the repeated suits for damages, the remedy was not as convenient, as beneficial or as effective, as the proceeding by mandamus." In Ransom v. Boston,[43] of a petition against the mayor to reinstate the petitioner in his employment as a laborer, the court says: "The petitioner has no such plain and adequate remedy by an action for damages that he should be denied relief in this manner. Successive actions for the amount of his wages, as these should accrue from time to time, would be far from giving him adequate redress. He has a right to receive the full amount of his wages, not lessened by the expense of recurring litigation. It is only in such a proceeding as this that a full measure of relief can be given to him." Similarly it is held in New York,[44] that a statute which provides for the recovery by suit of illegal taxes paid under protest, is not such an adequate remedy as to prevent

[42] 97 Va. 26.
[43] 193 Mass. 537.
[44] Re Coogan, 59 N. Y. S. 111.

the issue of mandamus, to compel the reduction of the assessment.

The existence of a remedy by an action in damages against a public officer for neglect of duty does not supersede mandamus, since such an action only affords pecuniary compensation and does not compel the performance of the specific duty required. So a remedy by indictment[45] for neglect of duty constitutes no objection to granting extraordinary aid, because an indictment is merely punitive, and not remedial, and can only punish the neglect of duty, without compelling its performance. Also a suit on the official bond of an officer is not an adequate remedy.[46] But it is held that mandamus, to compel a probate judge to pay over money wrongfully retained, should be refused, there being an adequate remedy by action upon his official bond; also where it is sought to compel a delinquent tax collector to pay over a tax within the time prescribed by his warrant and bond.

19. **A remedy in equity not a bar.**—That remedy, which will bar relief, is a remedy at law;[47] and an equitable remedy is not a conclusive objection, unless the parties already have invoked the aid of that remedy, although it may influence the court in the exercise of its discretion in the particular case. But in Massachusetts a remedy in equity which will give full and adequate relief, is a bar to a petition for prohibition,[48] mandamus,[49] and quo warranto; and

[45] Ayres v. State Auditors, 42 Mich. 422.
[46] Elliott County v. Kitchen, 14 Bush. 289 (Ky.).
[47] People v. Treasurer, 24 Mich. 468.
[48] Jaquith v. Fuller, 167 Mass. 123.
[49] Attorney General v. N. Y., N. H. & H. R. R., 197 Mass. 194.

in Ohio[50] to a petition for mandamus. In accordance with the general principle denying equitable relief when redress may be had by law, quo warranto, to test the right to an office or franchise, ousts all equitable jurisdiction of the case. And, since this remedy is applicable the moment the office or authority is usurped, an injunction will not lie to restrain the exercise of official functions,[51] when there has been no actual entry upon the office, because the party aggrieved can wait until an attempt is made to exercise the functions, and then pursue his remedy by quo warranto. Nevertheless in Massachusetts,[52] it is held: "The fact that a party is entitled to apply for a quo warranto, does not deprive him of his remedy by bill in equity in case of a private nuisance."

20. **Discretion of the courts.**—The courts exercise a discretion whether they will issue or refuse these writs;[53] and they will not issue them unless the petitioner satisfies the court that substantial justice requires it; nor when the equities[54] are against the petitioner; nor where they will work hardship to third parties not before the court; as, for instance, the court refused mandamus against the commissioner of the land office for procuring a title to public land, when other parties, claiming title to the land, were not represented in the proceedings; and in Oakes v. Hill,[55] the court declined to issue a mandamus, because it might affect the rights of persons who

50 State v. Carpenter, 51 Ohio St. 83.
51 Updegraff v. Crans, 47 Pa. St. 103.
52 Fall River Iron Works v. O. C. & F. R. R., 5 Allen 221 (Mass.).
53 Effingham v. Hamilton, 68 Miss. 523.
54 Wentworth Co. v. French, 176 Mass. 442.
55 8 Pick. 47 (Mass.).

had no opportunity to be heard. The courts generally will refuse mandamus when the duty to be enforced is so complex that they cannot superintend the performance.[56] In some states discretion is limited to cases where relief is sought in aid of private rights, and the writs must issue on behalf of the sovereign.[57] They seldom are issued for defects of form and not of substance in the proceedings.[58] Since it is discretionary with the court whether to grant or deny these writs, it is held in New York[59] that there is no appeal to the court of appeals; but the contrary is held in California.[60]

21. **The trial.**—The writs are not granted by default;[61] and the issues are tried in the same manner as in ordinary actions. The facts cannot be determined by affidavits, but by testimony, taken by depositions, or by calling witnesses. In England and in several states, issues of fact are tried by a jury; but in some states a jury cannot be demanded as of right. Since the Seventh Amendment to the Constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," proceedings in the federal courts,[62] where there is an issue as to damages, must go to a jury. In Florida and Idaho it is held that, in quo warranto, the right of trial by jury, as to issues of fact, existed

[56] Northern Pacific R. R. v. Dustin, 142 U. S. 492.
[57] State v. Doyle, 40 Wis. 220.
[58] Reed v. Curry, 40 Ill. 73.
[59] People ex rel. Adams v. Westbrook, 89 N. Y. 152.
[60] Havemeyer v. Superior Court, 84 Cal. 327.
[61] Freetown v. Bristol County, 9 Pick. 46 (Mass.).
[62] Chamberlain v. Warburton, 1 Utah 267.

at common law, and is preserved under a constitutional guaranty providing that "the right of trial by jury shall be secured to all, and remain inviolate forever." The New York code provides "that an issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury." The right to a jury trial has not been conferred by the Fourteenth Amendment to the Constitution of the United States.

22. **Costs.**—At common law no costs were allowed. Subsequently costs were allowed by statute in some cases, both in England and in the United States. Now costs usually are given to the prevailing party; but they are in the discretion of the court, and they may be awarded or refused according as the circumstances of each case may require.

23. **Jurisdiction—King's Bench and the United States Supreme Court.**—In England[63] the Court of King's Bench, by virtue of its prerogative power as superintendent over all other courts, tribunals, and public officials, may examine any of their proceedings by the issue of these writs; but the Supreme Court of the United States,[64] under the Constitution, has no jurisdiction to issue these writs, except in cases affecting ambassadors, other public ministers, and consuls, and those in which a state is a party. Since, however, the Supreme Court has admiralty jurisdiction under the Constitution, it may issue writs of prohibition to the district courts,[65] when proceeding as courts of admiralty. Also, if the Supreme

[63] R. v. Glamorganshire, 1 Lord Raymond, 580 (Eng.).
[64] Marbury v. Madison, 1 Cranch 137 (U. S.).
[65] Ex parte Christy, 3 How. 292 (U. S.).

Court already has acquired jurisdiction of any cause, by appeal or writ of error, then it may issue these extraordinary writs in such cause,[66] in aid of its jurisdiction.

24. **Same subject—Other federal courts.**—The other courts of the United States have not received jurisdiction to issue the extraordinary writs, except the writ of habeas corpus in certain cases, though Congress could give jurisdiction, since there is no constitutional difficulty, as in the case of the Supreme Court. But they may issue these writs as incidental to the other powers conferred upon them, and in aid of their jurisdiction. An exception was made, however, as early as 1838, in the case of Kendall v. United States,[67] in which it is held that the common law of Maryland passed with the cession of, and continued a part of the law of, the District of Columbia, and gave a right in the Circuit Court for the District of Columbia, wherever such right existed at common law. Also, it is held in United States v. Schurz,[68] that its successor, the Supreme Court for the District, may issue mandamus, even to officers of the executive departments of the national government. Thus control of federal officers by federal courts is made possible.

25. **Same subject—State courts.**—In those states where the courts of last resort are vested only with appellate power, they may issue the extraordinary writs[69] only in aid of the appellate jurisdiction

[66] Re Birninger, 7 Blatch. 159 (U. S.).
[67] 12 Peters 524 (U. S.).
[68] 102 U. S. 378.
[69] State v. Tracy, 94 Mo. 217.

Where they are courts of original jurisdiction, they may issue these writs, it is held in Harriman v. Waldo County,[70] upon the ground that, in every well-constituted government, the highest judicial authority must have a supervisory power over all inferior tribunals, for the prevention and correction of errors and abuses, where the laws do not expressly provide a remedy. Jurisdiction to issue the writs has been conferred by statute in some states upon county courts, justices' courts, and probate courts; and upon clerks of court, court commissioners, and justices of the peace; though the power of a ministerial officer to exercise an authority which is judicial in its nature, has been questioned.

[70] 53 Me. 83.

THE REMEDIES IN PARTICULAR

CHAPTER III.

MANDAMUS.

26. **Jurisdiction of federal and state courts.**—Whether the Supreme Court of the United States has authority to issue mandamus to a state court has not been decided; though the appellate jurisdiction, conferred by the Constitution, would seem to carry with it all the coercive requisites to support it. It also is doubtful whether it is within the power of Congress to confer upon the Circuit Court of the United States authority to compel by mandamus the removal of a cause from a state court. If, however, the state court is charged with duties which are administrative rather than judicial, as for instance, a county court to levy a tax for the payment of county bonds, then the Circuit Court of the United States may compel the county court to make the levy.[71] A state court cannot issue mandamus to a federal court.

27. **Against corporations.**—Mandamus formerly was confined to public corporations;[72] but the English courts now, and the American courts generally, issue the writ in the case of trading corporations,

[71] Shelley v. St. Charles County, 30 Fed. 603.

[72] R. v. London Assurance Co., 5 Barn. & Ald. 898 (Eng.).

though no public interest is involved. Railroad, gas, water, telegraph, and like corporations, are public corporations, against which the writ will issue.[73] Therefore, mandamus will compel a railroad to increase the number of its trains,[74] to stop at a station, to furnish suitable station accommodations,[75] and to construct crossings;[76] a telephone company to furnish a telephone;[77] and a gas company to furnish gas.[78] In some states it is held that the state has visitorial power over all corporations created by it, whether public or private; and by mandamus may compel[79] them to perform a specific duty, imposed upon them by their charters, by statute, by ordinance, or by the common law,[80] not only on the relation of the attorney-general in the case of a public duty, or on the relation of a municipality, or of some particular public officer or board, but also on the relation of a member of a corporation, or other individual, whose rights are violated. Nevertheless it generally is held that mandamus will not issue to enforce the by-laws of religious or social associations,[81] unless there are property rights involved.

28. **Against officers.**—Although here the writ is granted more freely now than it was formerly, and the distinction between public and private officers is not always made, nevertheless, it must be an office

73 People v. N. Y. C. & H. R. R. Co., 28 Hun 543 (N. Y.).
74 Ohio & M. R. Co. v. People, 120 Ill. 200.
75 People v. N. Y., etc., Railroad, 17 Abb. N. C. 304 (N. Y.).
76 Boggs v. Chicago B. & Q. Railroad, 54 Iowa 435.
77 State v. Citizens' Tel. Co., 61 S. C. 83.
78 Mackin v. Portland Gas Company, 38 Oregon 120.
79 State v. Chamber of Commerce, 47 Wis. 670.
80 State v. Republican Valley Railroad, 17 Neb. 647.
81 Barrows v. Mass. Med. Society, 12 Cush. 402 (Mass.).

and not a mere service or employment. Where a member of a board of police commissioners kept the records of one of their meetings, at the request of his associates, in the absence of their regular clerk, and made certain errors therein, the court refused to issue mandamus to compel him to correct these errors upon the ground that he was rendering a mere service and not an official duty.[82] So, if the person who has the books of a corporation, did not get them by virtue of any official relation to the corporation, and is merely a trespasser, mandamus will not issue against him. Mandamus will issue to compel a man to accept a public office, to which he has been duly and legally appointed. In Great Britain the courts will not issue the writ against the lords of the treasury,[83] or the secretaries of state, or other like high officers, on the ground that their duty is to the king, and they are his servants, and to issue the writ would be like the king issuing a mandamus to himself. Mandamus also does not issue to the President of the United States,[84] because his duties are political, and he is beyond the reach of any other control than impeachment. But mandamus may issue, for the performance of ministerial duties clearly imposed by Congress, from the Supreme Court of the District of Columbia, against heads of departments. There is a conflict[85] of authorities whether mandamus may issue from a state court to the governor; but in most states, even though the courts will not coerce the gov-

[82] Pond v. Parrott, 42 Conn. 13.
[83] R. v. Lords of the Treasury, 7 Q. B. 387 (Eng.).
[84] Kendall v. United States, 12 Pet. 524 (U. S.).
[85] Sutherland v. Governor, 29 Mich. 320.

ernor, they do not hesitate as against other officials; though, if jurisdiction against the governor fails, because of the isolation between the three departments of the government, then logically mandamus may not issue against any executive officer or agent.[86]

29. **Same subject—Federal and state officers.**—A state court cannot issue mandamus to a federal officer, because his official conduct can be controlled only by the power which created him. Neither can a federal court issue the writ against a state officer, except that a federal court may issue the writ to county officers[87] to levy a tax for the payment of a judgment, upon the ground that the Circuit Court, having jurisdiction under the Constitution in causes between persons of different states, must have authority to enforce its judgment. Mandamus may issue from a state court to a state official to compel obedience to a judgment of a federal court, as in Brown v. Crego,[88] to a county treasurer to compel payment from county funds of a judgment rendered against the county in a federal court; and in State v. Beloit,[89] to the town officers to compel the levy of a tax for the payment of a judgment rendered against the town in a federal court.

30. **Same subject—Title to office.**—If another is in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to mandamus, but must resort to quo warranto, in New York,[90]

86 Secombe v. Kittelson, 29 Minn. 555.
87 Riggs v. Johnson County, 6 Wall. 166 (U. S.).
88 32 Ia. 498.
89 20 Wis. 79.
90 People v. New York, 3 Johns. Cases 79 (N. Y.).

Georgia,[91] Missouri,[92] Nebraska,[93] and most of the United States, and in England;[94] but in Massachusetts,[95] Virginia, Maryland,[96] Michigan,[97] and some other states, this rule has not been followed; and the proper remedy is by mandamus.

31. **What duties it enforces.**—Mandamus compels the performance only of such duties as are purely ministerial, obligatory under a statute, or as a necessary result of the office, and so specific that no discretion[98] is left in their performance. Therefore, it will not lie to compel the postmaster-general[99] to readjust a postmaster's salary; nor to compel the Secretary of the Interior[1] to order the Commissioner of the Land Office to cancel an entry for land; nor to compel the auditor to audit and allow certain claims; nor to compel assessors to make an abatement of the petitioner's tax;[2] for the duty in each case clearly requires the exercise of discretion. It sometimes happens, however, that the same duty is considered to be discretionary in some jurisdictions and ministerial in others. For instance, the duty of public officers, required to let a contract to the lowest bidder, usually is regarded as discretionary and not subject to mandamus; but in State v. Board of Education of Dela-

91 Bonner v. State, 7 Ga. 473.
92 State v. Rodman, 43 Mo. 256.
93 Anderson v. Colson, 1 Neb. 172.
94 R. v. Phippen, 7 A. & E. 966 (Eng.).
95 Re Strong, 20 Pick. 484 (Mass.).
96 Harwood v. Marshall, 9 Md. 83.
97 Lawrence v. Hanley, 84 Mich. 399.
98 Prov. Sav. L. Ass. Soc. v. Cutting, 181 Mass. 261.
99 United States v. Key, 3 McArthur 328 (U. S.).
1 Gaines v. Thompson, 7 Wall. 347 (U. S.).
2 Sears v. Assessors, 208 Mass. 208.

ware County[3] it is held to be ministerial and to be enforced by mandamus.

An appointment to an official position, even if but a clerical position, is one involving the exercise of judgment;[4] therefore, it is an act over which the courts have no supervising power. Since the power of removal from office is incident to the power of appointment, the action of the Secretary of the Interior in removing a man from office, on account of inefficiency, is beyond review in the courts. But in McCarthy v. Emerson,[5] as to a petition for mandamus to the superintendent of streets in Boston, to restore the petitioner as foreman, the court says: "There is no doubt the reason assigned for the removal, neglect of duty, was a sufficient cause; and there is no doubt that if he was given a hearing upon this charge the respondent's conclusion was final and cannot be reviewed by this court, but the petitioner has had no such hearing. He was not allowed to know anything of the evidence on which the charge and specifications against him were based. He was merely allowed to make such statement as he desired. The removal was unlawful, and a peremptory writ of mandamus must issue as prayed for." When an officer's only reason for refusing to perform a duty is his erroneous construction of the law regulating that duty, the court will compel its performance.[6] Obligations which rest upon contract and involve no question of official duty, cannot be enforced by mandamus.

[3] 42 Ohio St. 374.
[4] Keim v. United States, 177 U. S. 290.
[5] 202 Mass. 352.
[6] Rice v. Commissioners, 13 Pick. 225 (Mass.).

CHAPTER IV.

PROHIBITION.

32. **When issued to a court.**—When the jurisdiction of a court, or of a tribunal, depends upon an act which is unconstitutional, proceedings therein may be restrained by prohibition; and while the most frequent occasions for the writ are where a court entertains some cause over which it has no jurisdiction, the necessity for the writ is the same[7] where, in a matter of which such court has jurisdiction, it goes beyond its legitimate powers; as when the petitioner, who had been ordered to appear in person to show cause in a contempt proceeding, appeared by counsel, the writ was issued to prevent the execution of an order for his arrest, it being held[8] that the court had not the power to make such an order. The writ will issue to a court martial,[9] as well as to an ordinary civil court.

33. **When issued to other tribunals.**—Boards, commissions, and officials, when invested with judicial powers, may be confined within the limits of their authority, when exercising such powers, but cannot be interfered with in their ministerial acts. Therefore, a tax collector, being a ministerial officer, cannot be restrained by prohibition from collecting

[7] Appo v. People, 20 N. Y. 531.
[8] Gordan v. Buckles, 92 Cal. 481.
[9] State v. Hopkins, Dudley 101 (S. C.).

a tax; and a city council[10] cannot be restrained by prohibition from investigating charges against the city solicitor, with a view to his removal from office; nor can it be punished for contempt in refusing to obey the writ. If, however, the council proceeds to try the solicitor upon these charges, then it would be exercising a judicial power and could be restrained by prohibition.

[10] Lodge v. Fletcher, 184 Mass. 238.

CHAPTER V.

CERTIORARI.

34. **Not issued to a common law court.**—This writ is issued to an inferior court when its proceedings are not according to the course of the common law, and therefore a writ of error will not lie. In Ex parte Randall,[11] a petition for certiorari to quash the proceedings of the superior court in removing the petitioner from practice, the court refuses the writ on the ground that "the power to remove an attorney for misconduct is incident to all common law courts, and the proceedings in such cases are to be deemed to be taken according to the course of the common law." So, in Lynch v. Crosby,[12] it is held that certiorari does not lie to quash the proceedings of a police court in issuing a warrant for the seizure of liquors, as such proceedings are according to the course of the common law. In Massachusetts and Illinois certiorari does not, and in Alabama, Arkansas, Michigan, Minnesota, Missouri, and many other states, it does lie to probate courts. So, in Massachusetts and South Carolina, it does not, and in New York and Tennessee it does lie to courts martial. It does not lie to a court which does not keep a record. So, where certain persons agreed, in writing, to submit all matters in difference between them to

[11] 11 Allen, 472 (Mass.).
[12] 134 Mass. 313.

three arbitrators, and the arbitrators made an award, and one of the persons, being dissatisfied, asked for certiorari, requiring the arbitrators to certify to court the submission and award, and all things touching and concerning the same, the court refuses the petition.[13]

35. **Other tribunals.**—The proceedings subject to review by certiorari are those of any tribunal, board, or officer, when acting in a judicial manner; and it "is not essential[14] that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes called quasi-judicial. The body of officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character." On the other hand to call a tribunal a court does not make it a judicial body in all its acts. "A county court is certainly a judicial body for some purposes, but no more so for the name, nor for the fact that it has a seal and a clerk and keeps a record. The making a subscription to the stock of a railroad company" by the county court is not judicial, but administrative, and therefore it is not subject to certiorari.[15] "The character of the act, rather than of the tribunal by which the act is done, is the test. The functions exercised by a municipal corporation may be legisla-

[13] Whitehead v. Gray, 12 N. J. L. 36.

[14] Drainage Commrs. v. Griffin, 134 Ill. 330.

[15] Re Saline County Subscription, 45 Mo. 52.

tive, administrative, or judicial, but only the acts done by it when exercising judicial functions can be reviewed under this procedure. The act does not cease to be legislative because the members of the city council are required to exercise their judgment."[16] The tribunal issuing certiorari must be established by law; and the action, therefore, of a medical association[17] in expelling a member is not subject to certiorari, since it is not a legal tribunal.

36. **What errors it corrects.**—At common law the writ called into question only the jurisdiction of the tribunal; but in Massachusetts, New York, Iowa,[18] and some other states, the writ extends to the review of all questions of jurisdiction, and also of all questions of regularity in the proceedings; but only to correct errors in law[19] and not the findings of fact. Certiorari was adopted in New York early in the history of that state, and was modeled upon the writ as administered in England under the common law, so that it brought into question the jurisdiction only, and not any question of law or fact upon the merits of the case. Until 1840 the decisions are consistent in applying the old rule that certiorari reviews only the jurisdiction; but about this year doubt began to be entertained whether questions of law also might not be considered by the courts. Accordingly, by small degrees, a departure was made from the old rule by some courts, although others refused to enlarge the functions of the writ. This

[16] Quinchard v. Alameda, 113 Cal. 664.
[17] People v. Med. Soc., 32 N. Y. S. 415.
[18] Smith v. Supervisors, 30 Iowa 531.
[19] Re Hayward, 10 Pick. 358 (Mass.).

conflict became so apparent in 1865 that Mr. Justice Morgan, in Baldwin v. Buffalo,[20] says no settled rule had been established, from which the courts had not subsequently departed. That case, however, holds that certiorari might bring up so much of the evidence as was necessary to present the question of law upon which the petitioner relied, to avoid the determination of the tribunal. Following this decision, there are a number of cases which settle the law to be that the writ takes up questions of law as well as jurisdiction, but that questions of fact cannot be considered.

[20] 35 N. Y. 375.

CHAPTER VI.

QUO WARRANTO.

37. **Against corporations—Municipal.**—The English reports afford frequent instances of the use of the information for municipal affairs, the most famous being the information filed in the reign of Charles II. Since he was in want of money, and was unwilling to summon Parliament, he caused informations to be brought against most of the towns in the kingdom, upon a supposed, or frequently a real, forfeiture of their franchises, by neglect or abuse; and the liberties of most of them were thrown into the hands of the king, who granted them fresh charters, with such alterations as he thought expedient; but meanwhile their revenues were in his hands. Eighty-one quo warranto informations were presented against municipal corporations during the reigns of Charles II and James II. The notorious Jeffreys "made all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns." The writ against London alleged two misdemeanors: tolls on goods brought into market, and the petition of the city to the king to summon Parliament. Judgment of forfeiture was obtained from the King's Bench; and, as a condition of the restoration of the charter, it was provided that thereafter the mayor, sheriff, and clerk should not exercise their offices without the king's consent; and

that, if the king twice disapproved of the officers elected by the corporation, he might himself appoint others. After the accession of William and Mary a bill was passed to restore the rights of the English towns; the judgment against London was reversed by statute, and by the same statute it was enacted that the franchises of the city never more shall be forfeited for any cause whatsoever.

There is no instance in the United States where a municipal charter has been forfeited on account of the misconduct of its officers. Upon an information, however, to oust persons assuming to act as municipal officials, the court may determine, it is held in some states, whether there is a law authorizing the organization of the municipality.[21] The courts will oust municipalities[22] from the exercise of franchises which were not granted them by their charters. The authorities are conflicting[23] whether the information may be used to test the legality of the exercise of corporate powers outside of municipal boundaries.

38. **Same subject—Other corporations.**—An information lies against a corporation which acts beyond the powers conferred upon it,[24] even though it is engaged in interstate commerce;[25] it will lie to prohibit a foreign corporation[26] from exercising its franchises within a state, without permission, although the courts have no power to affect by their judgments the corporate existence of a foreign cor-

[21] State v. Weatherby, 45 Mo. 17.
[22] People v. Oakland, 92 Cal. 611.
[23] Stultz v. State, 65 Ind. 492.
[24] Attorney General v. Perkins, 73 Mich. 303.
[25] State v. Cincinnati, etc., R. Co., 47 Ohio 130.
[26] State v. F. & C. I. Co., 39 Minn. 538.

poration. Since it is a condition of incorporation that the grantees shall act up to the design for which they are incorporated, hence, through neglect or abuse of its franchises a corporation may forfeit its charter,[27] and in Terrett v. Taylor,[28] forfeiture for misuser or non-user is held to be "the common law of the land and a tacit condition annexed to the creation of every corporation." Both in Great Britain and in the United States contracts in restraint of trade are illegal; and, when corporations enter into a combination or trust, they are open to attack by quo warranto, because they have attempted to grant away the franchises which were conferred upon them, in breach of the implied condition that the particular grantees shall retain them, and because, in the creation of a monopoly,[29] they employ their franchises in an illegal act. But no reliable rules for determining to what extent competition may be bought off without contravening public policy against monopolies, can be laid down. The same facts have led to opposite decisions. So it is held in Attorney General v. Tudor Ice Co.,[30] an information on behalf of the commonwealth will not lie against a private trading corporation, to restrain it from engaging in a particular kind of business, where its proceedings are not shown to have injured any public rights, and are objected to only because they are not authorized by the act of incorporation.

39. **Franchises and powers.**—In State v. M. T. M.

[27] Mumma v. Potomac Company, 8 Pet. 281 (U. S.).
[28] 9 Cranch 43 (U. S.).
[29] Distilling, etc., Co. v. People, 156 Ill. 448.
[30] 104 Mass. 239.

Co.,[31] Mr. Justice Mitchell makes a distinction between franchises and powers, saying: "To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power. The only franchise which corporations possess is the general franchise to be or exist as a corporate entity. Hence, if they engage in any business not authorized by the statute, it is in excess of their powers, but not a usurpation of a franchise not granted, nor necessarily a misuser of those granted. Acts in excess of powers may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture. How far they must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting the gradual process of judicial inclusion and exclusion as the cases arise. A dram shop license is held, in Martens v. People,[32] to be a public franchise for the forfeiture of which quo warranto will lie; but in Hargett v. Bell,[33] it is held that such a license is neither a franchise nor an office. In People v. Mutual Gaslight Company,[34] it is held that the right, conferred by ordinance upon a corporation, to lay gas pipes in the streets is not a franchise, but a local easement, and quo warranto will not lie against the company on the ground that it has forfeited the right to use the streets, by violating the conditions of the grant; but, where the statute extends the remedy

[31] 40 Minn. 213.
[32] 186 Ill. 314.
[33] 134 N. C. 394.
[34] 38 Mich. 154.

to privileges and licenses, as well as to franchises, then, it is held in People v. Chicago Telephone Company,[35] it will lie.

40. **Against officers—Public.**—In England[36] there was doubt at one time whether the information would lie only for offices created by charter of the king, or also for those created by act of Parliament; but the English law now appears to be that information will lie for usurping any office, whether created by charter alone, or by the crown, with the consent of Parliament, provided the office be of a public nature, and a real office, not merely the employment of a servant. Also in Haupt v. Rogers,[37] and in Attorney General v. Drohan,[38] it is held that an information to try the title to an office is confined to a public office and does not lie for an office in a private corporation or in a political party, since the judgment for removal would be nugatory, "for the corporation might immediately reinstate them."[39] To like effect is People v. Ridgely,[40] where the governor appointed Ridgely trustee of the assets of a state bank, and later removed him and appointed another, but Ridgely continued to hold the assets of the bank. Mr. Justice Breese says: "An information can only be resorted to in cases in which the public have some interest. These defendants have a high duty to perform, but it is to the creditors of the bank and its stockholders. The public, as such, have not a particle

35 220 Ill. 238.
36 Darley v. The Queen, 12 C. & F. 520 (Eng.).
37 170 Mass. 71.
38 169 Mass. 534.
39 Commonwealth v. Dearborn, 15 Mass. 125.
40 21 Ill. 65.

of interest in the matter. It is a clear case between trustees and cestui que trust—who are not the people." While the chief engineer of a railroad and a professor in a university are held not to be public officers, there is a diversity of opinion about a city[41] or county physician and a pilot. It is a public wrong, however, in some states, for one to administer an office in a private corporation, if there be no de jure corporation, since this is a usurpation of a corporate franchise; and it also is a public wrong if the privilege by the state has been abused. The respondent must be in actual possession of the office, and not a mere claimant; and therefore some use must be shown, but it has been held to be a sufficient showing of use if the respondent has taken the oath of office.[42]

41. **Same subject—Private.**—An intrusion into an office of a private corporation may be corrected by information, in several states, with the same propriety as in cases of public corporations, because in both cases an unfounded exercise of a corporate franchise is a usurpation of privileges granted by the state; in several states information is by statute the proper remedy to test the title to offices in private corporations. In Commonwealth v. Arrison,[43] Mr. Chief Justice Tilighman says: "In all cases where a charter exists, and the question arises concerning the exercise of an office claimed under that charter, the court may grant leave to file an information; because the party against whom the information is prayed has no claim but from the grant of

[41] Commonwealth v. Swasey, 133 Mass. 538.
[42] People v. Callaghan, 83 Ill. 128.
[43] 15 S. & R. 127 (Pa.).

the commonwealth, and an unfounded claim is a usurpation, under pretense of a charter, of a right never granted." But in People v. DeMill,[44] the court says: "Although the statute says the information may be filed against any person usurping office in any corporation created by authority of this state, yet there must be cases in which the court may refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a village district debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of officers, it can scarcely be urged that the court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not rise to the dignity of being entitled to the notice of the attorney-general by information."

42. **Same subject—Preliminary proceedings.**— When an officer has been elected and qualified, the authorities are in conflict as to what proceedings must precede a petition for quo warranto to remove him. In some states it is held that when the forfeiture has been caused by a criminal act there must be a conviction thereof by a jury before quo warranto can be brought; but in Royall v. Thomas,[45] the opposite is held. Forfeiture for cause other than crime, it is held, in Commonwealth v. Allen,[46] may be found by the court for itself in the quo warranto proceedings.

[44] 15 Mich. 161.
[45] 28 Grattan 130 (Va.).
[46] 70 Pa. 465.

It is now well established that, in proceedings by information to test the title to a public office, the return or certificate of canvassing officers as to the result of the election is not conclusive, as such officers are only ministerial officers with no judicial functions, and their return is but prima facie evidence in favor of the incumbent of the office. The courts, therefore, go behind such return and, if satisfied that it is erroneous, judgment of ouster will be given. The ballots, and not the canvass of those ballots, constitute the controlling evidence of election.

In re Strong,[47] and in State v. Lane,[48] it is held that in quo warranto the court "can only pass upon the question of the defendant's election, as quo warranto lies to remove the illegal incumbent of an office and not to put the legal officer in his place." But in Michigan, Nebraska, New York, Ohio, Wisconsin, Texas, California, Indiana, Kansas, and New Jersey, the remedy has been extended to determine the right of the petitioner to the office and seat him if necessary. And in Indiana, and perhaps also in Louisiana and Mississippi, if the petitioner fails to establish his title, the proceeding fails.

43. **Same subject—Federal and state officers.**—It is held in State v. Curtis,[49] that an information will not lie in a state court to try the right to office of a director in a national bank; and in State v. Bowen,[50] to determine the title of a presidential elector, though the power to appoint to the office is in the state, be-

[47] 37 Mass. 484.
[48] 16 R. I. 620.
[49] 35 Conn. 374.
[50] 8 S. C. 400.

cause his privileges are exercised under the laws of the United States. Although a petition for mandamus cannot be transferred, the Supreme Court holds, in Rosenbaum v. Bauer,[51] from a state to a federal court, yet when, under the laws of a state, an information in the nature of a quo warranto is regarded as an ordinary civil action, and is brought by the state in one of its own courts, to test the right of a foreign corporation to the exercise of corporate franchises within the state, it is removable to the Circuit Court of the United States.

44. **When relief must be in equity.**—Although a court of equity may hold the officers of a corporation accountable as trustees for their trust, it has no jurisdiction[52] in regard to the regularity of their election or removal, and it cannot divest corporations of their corporate character and capacity, since these are subjects of common law jurisdiction. And, on the other hand, since quo warranto only tests the right to an office or franchise, it affords no relief for official misconduct, or a breach of trust. Such relief should be sought in equity. Quo warranto may oust an incumbent of an office because of misconduct, if such misconduct operates as a forfeiture of the office; but if the title is not questioned, quo warranto cannot be used to restrain a public officer from doing any particular act, the right of doing which is an integral part of the rights of the office.

[51] 120 U. S. 450.

[52] Saltman v. Nesson, 201 Mass. 534.

CHAPTER VII.

HABEAS CORPUS.

45. **What is custody.**—Every restraint upon a man's liberty is an imprisonment, wherever the place or whatever the manner. Words may constitute an imprisonment[53] if they impose a restraint upon the man, and he submits. When a man submits without resistance to a sheriff, who has a writ in his hands for the arrest of the man, this is imprisonment, because if he attempts to resist the officer can summon bystanders to his assistance and may himself use personal violence. It is physical power which controls, though it is not called into action.

The writ, stating the time and cause of imprisonment, commands the respondent to have the body of the prisoner at a designated place and time, to do and receive what shall then and there be determined concerning the said prisoner and to "have then and there this writ." As the process under which the prisoner was held, is superseded by habeas corpus, the custody of the prisoner remains in the court issuing the writ. The custody being thus taken away from the sheriff, he is not responsible for the escape of the prisoner, while in custody of the court, and before a remand or other order is made placing new duties upon the sheriff.[54]

[53] Pike v. Hanson, 9 N. H. 491.
[54] Barth v. Clise, 12 Wall. 400 (U. S.).

46. **Jurisdiction of federal and state courts.**— Formerly many state courts exercised jurisdiction on habeas corpus to inquire into the lawfulness[55] of restraint under federal authority, though this jurisdiction often was denied by the federal courts. In 1858 the Supreme Court of the United States decided that if, upon application for habeas corpus, it does not appear in what custody the prisoner is held, a state court may issue the writ to inquire into the authority for the detention, but being apprised by the return that he is held under the federal authority, the jurisdiction is at an end;[56] and that if the application states that the prisoner is confined under the authority of the United States no state court can assume any jurisdiction, and all acts in pursuance of such assumed jurisdiction are void. Nevertheless in Sanborn v. Carleton,[57] when Sanborn was summoned to appear before the select committee of the Senate "to inquire into the facts attending the seizure of the armory of the United States at Harper's Ferry by a band of armed men," and he refused to appear, and the Senate, by resolution, directed the sergeant at arms "to take into his custody the body of said F. B. Sanborn wherever to be found, and to have the same forthwith before the bar of the Senate to answer for contempt of the authority of the Senate in thus failing and refusing to appear before said committee," and the sergeant gave the warrant to his deputy, who arrested Sanborn; and the latter brought a petition for habeas corpus; the Supreme

[55] Commonwealth v. Harrison, 11 Mass. 63.

[56] Re Tarble, 13 Wall. 397 (U. S.).

[57] 15 Gray 399 (Mass.).

Judicial Court of Massachusetts rules that the arrest was illegal and orders "said Sanborn be discharged from the custody of said Carleton."

Although no state court can make any further inquiry, after the return to habeas corpus that the person is in the custody of the United States, on the other hand, where one is imprisoned by a state authority in alleged violation of the Constitution, laws, or treaties, of the United States, the federal courts will inquire into the jurisdiction of the state court. The writ will issue in favor of persons imprisoned for contempt by a state court,[58] if the acts which constitute the contempt were done in the discharge of duties imposed by the laws of the United States. Where a person is in custody under process from a state court for an offense against the laws of such state, and the local statute under which he was indicted, is repugnant to the Federal Constitution, it is held the Circuit Court may discharge him, upon habeas corpus, in advance of his trial in the state court.[59]

47. **Same subject—Under the Revised Statutes.** —The jurisdiction of the federal courts to issue habeas corpus, as prescribed by the Revised Statutes, extends to five classes of cases: first, where a person is in custody under the authority of the United States; second, where he is in custody for an act done, or omitted, under a law of the United States, or under an order, process, or decree, of a federal court; third, where he is in custody in violation of the

[58] Electoral College's Case, 1 Hughes 571 (U. S.).
[59] Ex parte Royall, 117 U. S. 241.

Constitution, or of a law or treaty, of the United States; fourth, where, being a subject of a foreign state and domiciled therein, he is in custody for an act done, or omitted, under a right, privilege, or exemption, claimed under the sanction of any foreign state, the validity whereof depends upon the law of nations; and fifth, where it is necessary to bring him into court to testify. Unless the restraint comes within one of these classes, the federal courts have nothing to do with the matter.

Under the second class is the famous Neagle case.[60] Threats had been made by one Terry to take the life of Justice Field of the Supreme Court of the United States, and a deputy marshal, named Neagle, was delegated to protect the judge. Terry made an assault upon Justice Field, and thereupon Neagle shot and killed Terry. Neagle was arrested for murder by the State of California and applied to the Circuit Court of the United States for a writ of habeas corpus. The Supreme Court holds that, although the killing might be considered an offense against the state, yet since the deputy marshal was acting under the authority of the United States, the federal courts have jurisdiction to issue habeas corpus to inquire into the cause of his detention and discharge him, and that he cannot afterwards be tried in the state court. When, therefore, United States marshals, or their deputies, are arrested by state authority for using force in executing process of the federal courts, habeas corpus, the court says in United States v. Fullhart,[61] will effect their release; but this decision has

[60] 135 U. S. 1.
[61] 47 Fed. 802.

been questioned by the Supreme Court of Pennsylvania.

The third class was included in 1867, to protect emancipated negroes in their civil rights; but the rule is interpreted to give the federal courts power to reverse by habeas corpus the criminal judgments of the state courts, and to pass upon the validity of the police regulations, the criminal codes, and even the constitutions of the states. Such an interpretation is in direct contravention of all the previous decisions of the Supreme Court of the United States, and of the decisions of the English courts.

The fourth class was included in 1842, to meet the complications which grew out of the attack by British troops in 1837 upon the steamer Caroline, which was moored off the shore of New York in the Niagara river, after conveying munitions of war to Canadian insurgents on Navy Island. A member of this attacking force was arrested in New York and indicted for murder; the British government demanded his release, and the Supreme Court of New York refused to release him. A serious international complication might have followed but for the circumstance that, upon his trial under the indictment, he was acquitted. Now the federal courts may grant habeas corpus in all cases of aliens who are in custody for acts done under the authority of their government.

These provisions of the Revised Statutes apply to any custody whatsoever, whether by a state court, federal court, or a person acting outside of court. A Chinaman, detained on board a ship, under the Chi-

nese Restriction Act, by the master, or by the customs authorities, is in custody under the authority of the United States, and the federal courts may issue habeas corpus for his release.[62] Refusal to permit a Chinaman to land is a restraint of liberty, remediable by habeas corpus.[63] But the decision of the collector of customs, denying transit across the United States to a Chinaman possessing a through ticket to a point in foreign territory, cannot be reviewed by habeas corpus since, under the regulations authorized by the treaty with China, there is no provision for the review of this decision.[64] A person held in slavery by one of the tribes of Alaska is held in violation of the laws of the United States, and may be discharged by a federal court.[65] An Indian is a person within the meaning of the habeas corpus act and is entitled to habeas corpus in the federal courts[66] when deprived of his liberty under authority of the United States, or in violation of a law of the United States, or in violation of a treaty.

48. **Same subject—Legislative custody.**—The court has the power to inquire on habeas corpus into the lawfulness of imprisonments by order of the legislature;[67] "because, living under a written Constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine whether the powers of any branch of the government, and even those of the

[62] United States v. Chung Shee, 711 Fed. 277.
[63] U. S. v. Jung Ah Lung, 124 U. S. 621.
[64] Fok Yung Yo v. United States, 185 U. S. 296.
[65] Re Sah Quah, 31 Fed. 327.
[66] United States v. Crook, 5 Dillon 453 (U. S.).
[67] Burnham v. Morrissey, 14 Gray 226 (Mass.).

legislature, have been exercised in conformity with the Constitution; and if they have not been, to treat their acts as null and void." But in England, if it appears that the prisoner stands committed for a contempt adjudged against him by the House of Commons, the court before whom the matter is brought, cannot judge of the contempt, or bail the prisoner, but immediately must remand him. The writ will protect from arrest on civil process a witness before the legislature.[68] The supreme court may "inquire into the jurisdiction of a court martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence."[69]

49. **The return to the writ.**—The person to whom the writ is directed, whether by a state or a federal court, must make return thereto no matter by what authority, state or federal, he holds the prisoner.[70] "This right to inquire, by process of habeas corpus, and the duty of the officer to make return, grows necessarily out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers and each within its sphere of action, prescribed by the Constitution of the United States, independent of each."[71] But, although it is the duty of the marshal to make known by a proper return the authority under which he detains the prisoner, it is his duty also not to take

[68] Re Emery, 107 Mass. 172.
[69] Re Grimley, 137 U. S. 147.
[70] Bagnall v. Ableman, 4 Wis. 184.
[71] Shirk's case, 5 Phil. 333 (Pa.).

the prisoner before a state court,[72] because no state court, after being informed that the party is imprisoned under the authority of the United States, has any right to interfere with him or require the production of his body.

"Upon a return to a habeas corpus that the prisoner is detained under a sentence by a court having jurisdiction of the cause, the general rule is that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a course if the error be apparent and the imprisonment unjust the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error."[73] But when a court undertakes to punish a man for refusing to comply with an order which that court had no authority to make, the order is void, and the superior court will, by its writ of habeas corpus, discharge the prisoner.[74]

50. **Errors in sentence.**—If there is error in the sentence under which the prisoner is held, the remedy is by writ of error.[75] But if the want of jurisdiction appears on the face of the proceedings the prisoner will be discharged.[76] "When the proceedings are irregular or erroneous, if the court or magistrate has jurisdiction, the judgment is voidable

[72] Ableman v. Booth, 21 How. 506 (U. S.).
[73] Ex parte Siebold, 100 U. S. 371.
[74] Ex parte Fisk, 113 U. S. 713.
[75] Re Stalker, 167 Mass. 11.
[76] Herrick v. Smith, 1 Gray 12 (Mass.).

only, and not void, and, of course, must stand good until revised or annulled in a proper course of proceedings, by a court having authority to revise and annul it. But where it appears, on the face of the proceedings, that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged from his imprisonment without reversal of the judgment." Nevertheless in exceptional cases, relief may be granted by, and questions of constitutionality considered upon, habeas corpus.[77]

51. **Errors in commitment papers.**—If the papers are insufficient on their face to justify the arrest of a person the court will discharge him. "It is not open to the petitioner to call in question the correctness of the decision of the justice, as to the sufficiency of the evidence offered to sustain the complaint, or as to the legal effect to be given to evidence offered and relied upon in defense; or in other words, to show that, had there been a proper application of the law to his case, he would have been acquitted. But inasmuch as the right to hold the petitioner in present custody is justified under a mittimus, if this be an invalid warrant, no effect can be given to such an order, nor the party be held in custody."[78]

52. **When findings of fact conclusive.**—Since the administration by Congress of matters within its exclusive control is not cognizable by the courts,[79] then if Congress vests this function in administrative

[77] Re Bishop, 172 Mass. 35.
[78] Adams v. Vose, 1 Gray 51 (Mass.).
[79] Murray v. Hoboken, etc., Co., 18 How. 272 (U. S.).

officers, they may be the final judges of the facts upon which their decisions are based.[80] The admission of aliens is within the control of Congress and, therefore, the finding of facts on which the decision of their admissibility is based may be put exclusively into the hands of the administrative officers.[81] In United States v. Ju Toy,[82] Ju Toy was a passenger on a steamship returning from China to San Francisco, the immigration officers detained him as an alien, though he declared he was born in the United States and always had lived there, having gone to China only as a visitor. He procured a writ of habeas corpus from the district court which found, as a matter of fact, that Ju Toy was a citizen of the United States. But the Supreme Court, upon appeal, Mr. Justice Holmes writing the opinion, finds, as a matter of law, that it mattered not whether Ju Toy was a citizen of the United States or not; if the commissioner of immigration decided that he had not been born in the United States, and was not entitled to enter the country, there was no redress for Ju Toy. Justices Brewer, Peckham, and Day dissented, Mr. Justice Brewer writing a vigorous opinion.

53. **Suspension of the writ—By the President.**—Under Article I, § 9, of the Constitution, Congress can suspend the privilege of habeas corpus; but this section does not place such authority elsewhere. Early in the Civil War, President Lincoln authorized General Scott to suspend the writ at any point on the military line between Philadelphia and Washington.

[80] Public Clearing House v. Coyne, 194 U. S. 497.
[81] Fok Yung Yo v. U. S., 185 U. S. 296.
[82] 198 U. S. 253.

In 1861 John Merryman was held in Fort Henry, under order of Secretary Seward, on a charge of treason. An application[83] was made to the Supreme Court for habeas corpus, and Chief Justice Taney issued the writ, commanding General Cadwalader, who was in command of the fort, to produce Merryman before him; but the general refused to obey, and, when Chief Justice Taney issued an attachment, he shut the marshal out of the fort. The court says: "I can see no ground whatever for supposing that the President, in any emergency, can authorize the suspension of the privileges of the writ of habeas corpus or the arrest of a citizen, except in aid of the judicial power. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed in court and direct the clerk to transmit a copy to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, 'to take care that the laws be faithfully executed,' to determine what measure he will take to cause the civil process of the United States to be recognized and respected and enforced." September 24, 1862, the President ordered that all persons discouraging enlistments, guilty of disloyal practices, or offering aid to the rebels, should be subject to trial by a military commission, and that habeas corpus should be suspended in respect to all such persons.

54. **Same subject—By Congress.**—Up to this time

[83] Ex parte Merryman, 9 Amer. L. Reg. 524.

Congress had not suspended the writ. March 3, 1863, Congress authorized the President, during the rebellion, to suspend habeas corpus in any case, throughout the United States, or any part thereof; and September 15, 1863, President Lincoln proclaimed a general suspension as to aiders or abettors of the enemy, and defined these to be those "who seek to exalt the motives and capacity of armed traitors, and to magnify their resources, or who inflame party spirit among ourselves and give to the enemy that moral support which is more valuable to them than regiments of soldiers or millions of dollars." August 13, 1864, Lambdin P. Milligan, a lawyer, delivered a political speech at Fort Wayne, in which he criticized Governor Morton of Indiana, a candidate for re-election. He was arrested, placed on trial before a military commission, found guilty, and sentenced to death. He petitioned for habeas corpus, and Justice Davis holds the commission had no jurisdiction to convict Milligan, saying, "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction; it is also confined to the locality of actual war." W. H. McCardle, the editor of a Vicksburg newspaper, was convicted by court martial on the charge that he had published articles to impede reconstruction. McCardle procured habeas corpus from the District Court. Upon the return General Ord sets forth that he held the prisoner under the Reconstruction Act, and the court dismissed the writ. McCardle appealed to the Supreme Court, which denied a motion to dismiss his appeal, and heard the case. Later, however, Congress

took away from the Supreme Court its jurisdiction in the McCardle case, and the appeal, therefore, was dismissed.

55. **Same subject—By the states.**—A few of the states, at very rare intervals, have suspended the writ. Massachusetts did so during Shay's rebellion, from November, 1786, to July, 1787. Neither the President nor Congress can suspend the issue of the writ by a state court. Suspension of the privilege of the writ does not suspend the writ itself. It issues as a matter of course, and on its return the court decides whether the applicant is denied the right of proceeding further.

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QUIZ QUESTIONS

EXTRAORDINARY REMEDIES

(*The numbers refer to the numbered sections in the text.*)

1. Name and define five extraordinary remedies at common law.
2. To what extent, if at all, will courts of equity recognize and enforce these remedies?
3. Does the maxim, "He who comes into equity must do so with clean hands," apply in the enforcement of extraordinary remedies? If so, to what extent and under what circumstances?
4. To invoke the doctrine of laches, is it always necessary that the defendant prove that the Statute of Limitations has barred the claim?
5. What was the origin of the writ of mandamus?
6. What were the origin and purpose of the writ of prohibition, and to what extent and to what uses is it now put?
7. State the origin, purpose, and effect of the writ of certiorari.
8. In a proceeding quo warranto, to whom would you apply for leave to file the writ, and what would be the effect of such application, if granted?
9. A is arrested without sufficient warrant or other legal proceedings. Can he avail himself of the habeas corpus as a remedy?
10. Distinguish between the rules governing the issuance of writs of right and of writs, the granting of which rests primarily in the discretion of the court.
11. The defeated party in a suit at law, having complied with the rules of court, demands of the clerk that he prepare the common law record; this the clerk, without lawful ex-

cuse, refuses to do. What remedy has the demandant to procure the record?

12. A, a married woman, has been placed in an insane asylum by her husband. May B, her brother, file a petition for habeas corpus on her behalf?
13. A taxpayer seeks a writ of mandamus to compel the county treasurer to extend the taxes upon property similarly situated and as against other owners. Whom should he make parties defendant?
14. Petition for habeas corpus is filed; you represent the sheriff. What would your first pleading be, if upon examination you found the petition insufficient upon its face?
15. The court, upon full consideration, awards a writ of mandamus. What order should the record then show?
16. Plaintiff brings an action and secures judgment. If such judgment may be reviewed upon appeal, will the writ of prohibition lie?
17. Distinguish between the cases in which the state and the cases in which the individual may pursue the extraordinary remedies.
18. If there be any other available and adequate remedy, under what circumstances, if at all, will the writ of mandamus lie?
19. Under what circumstances, if any, will a court of equity interfere to prevent the issuance of a writ of mandamus?
20. To what extent may the court exercise discretion in granting these writs, and how far are the parties bound by the exercise thereof?
21. An issue of fact is presented; the defendant demands trial by jury. Should such demand be complied with?
22. A writ of mandamus is refused; the defendant asks the court to tax costs in his behalf. Ought the court to do so?
23. In a general way, state what courts have jurisdiction to issue these extraordinary writs.
24. In event that a constitutional question is involved, may the district court of the United States issue a writ of habeas corpus?
25. The jurisdiction of the supreme court of a certain state is in part original. Can such court entertain a petition for habeas corpus?

26. May a state court of general jurisdiction issue a writ of prohibition to a district court of the United States?
27. A public service corporation refuses to perform a plain duty. What is the remedy of one specifically injured by such refusal?
28. Will mandamus lie against a superior officer holding his office by virtue of election and performing political duties only?
29. Under what circumstances, if any, may the federal courts issue writs of mandamus against state courts or their officers?
30. A is actually discharging the duties of the office of justice of the peace; B claims that he himself was duly elected to such office and seeks to oust A. What is his proper remedy?
31. Distinguish between the duties enforcible by mandamus — that is, between those judicial, those ministerial, and those only obligatory.
32. A court exceeds its jurisdiction regarding the person and also the subject matter. Can the injured party obtain a writ of prohibition?
33. Will a writ of prohibition lie to restrain a purely ministerial officer from the performance of certain of his legal duties?
34. What is the purpose of a writ of certiorari and under what circumstances may it be sued out?
35. Will the writ of certiorari lie to review the action of other than judicial bodies?
36. Upon consideration of the writ of certiorari, what questions will come before the court for determination?
37. To what extent, if at all, will quo warranto lie to compel the officers of municipal corporations to perform their duties as such?
38. Under what circumstances, if any, will an information for quo warranto lie against corporations other than municipalities?
39. Distinguish between powers, licenses, franchises, and easements in so far as quo warranto applies to each of them?
40. Will the writ of quo warranto lie to oust an officer of a public corporation? If not, why not?
41. Under what circumstances, if any, will the writ of quo warranto lie to oust officers of private corporations?

42. One having, upon the face of the returns, been elected to a public office, can the court, upon information filed, go behind the returns to ascertain the facts?
43. A holds office under the federal government. Will an information in the nature of quo warranto lie to question his right to such office?
44. Under what circumstances may a court of equity grant substantially the same relief as can a court of common law, in quo warranto proceedings?
45. A writ of habeas corpus issues; the petitioner is brought into court by the sheriff; he disappears from the court room. Is the sheriff liable as for an escape?
46. Under what circumstances, if any, will the federal courts entertain a writ of habeas corpus to relieve from the wrongful acts of state courts?
47. In what instances will the federal courts issue writs of habeas corpus? What is the basis of such action?
48. A state legislature causes the imprisonment of a person as for contempt. What jurisdiction, if any, has the supreme court of such state to inquire into the legality of the imprisonment?
49. If A be convicted by the judgment of an inferior court, will a superior court ever grant him relief by way of habeas corpus?
50. Where errors appear upon the face of the record and the prisoner has not lost his right to have such errors reviewed, can he do so by writ of habeas corpus?
51. A mittimus is issued against Jones; it is insufficient on its face; Jones sues out a writ of habeas corpus. Ought he to be discharged?
52. A ministerial officer makes a finding of fact. To what extent, if any, will the courts review this finding upon habeas corpus?
53. Under what circumstances, if any, and by what authority may the writ of habeas corpus be suspended?
54. Has the United States Congress power to suspend the writ of habeas corpus under any circumstances?
55. A state suspends the writ of habeas corpus. Can the federal government interfere to restore the right?

PART V

HABEAS CORPUS

BY

JOHN WURTS, M.A., LL.B., M.L.*

CHAPTER I.

EFINITION, NATURE AND HISTORY OF THE WRIT.

1. **Definition.**—Habeas corpus is a process de-gned and employed to afford summary relief gainst illegal restraint of personal liberty. This efinition embodies with epigrammatic brevity the ntire substantive law of habeas corpus. Were it not or the necessity of defining the word "illegal," we ould drop this branch of the subject and take up the ules governing the procedure, which constitute the djective law.

Substantive law is the law of rights which the ourts are called on to administer, as distinguished rom the rules of procedure, or method by which a determination of rights is reached. These rules of procedure are called adjective law. Thus, the law which determines the rights of the parties to a con-ract is substantive law; while, if suit be brought for an alleged breach of the contract, the rules which govern the mode of reaching the issue (the plead-

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ings), the selection of a jury, the production and examination of witnesses, the arguments, the charge of the court, the verdict, etc.,—in other words, the rules adopted to secure orderly procedure in the administration of justice,—are adjective law.[1]

2. **Nature of the writ.**—Habeas corpus is one of the four great prerogative writs which we owe to the jurisprudence of England.[2] It was called a prerogative writ because it was a part of the king's prerogative to protect his subjects in the enjoyment of their civil rights, and in fact and in form the proceeding was instituted and prosecuted in the name of the king for the purpose of effecting a restoration to the subject of that greatest of all civil rights, the right of personal liberty, of which he had been unlawfully deprived. The object of the writ being to effect the restoration of a civil right and not to punish an offender, it is a civil, as distinguished from a criminal, proceeding,[3] the latter being, as to its object, punitive. It is called an extraordinary writ,—extraordinary because it is a remedy which supersedes the ordinary methods of judicial procedure,—trial by jury, formal sitting of court in term, etc. The proceedings are always summary, drastic, and, to a certain extent, informal. It is also called a writ of right. Originally, the writ could only be obtained of the king's grace; but since the day of the king's guarantee contained in Magna Charta, that no man should be im-

[1] Bouvier's Law Dictionary, title Law.

[2] The other three prerogative writs are Mandamus, Quo Warranto, and Prohibition. Habeas corpus literally translated is "that you have the body."

[3] Ex parte Tom Tong, 108 U. S. 556.

risoned but by the lawful judgment of his peers, or y the law of the land, reinforced by acts of Parliament, and in this country declared by constitutional rovisions and legislative enactments, it has been a rit of right; that is, the subject has the absolute ight, on a showing that he is illegally confined, to pply for and obtain the writ and thereupon to have he legality of his confinement determined. Nevertheless the writ, to this day, retains its prerogative haracter as being a proceeding by the king, or by he United States, or by the state, on behalf of the ubject.[4]

3. **Different forms of habeas corpus.**—All that has been said in the preceding sections applies solely to the writ whose definition is above given, which is technically called *habeas corpus ad subjiciendum et recipiendum* (that you have the body to submit to and receive). In early days there were several other processes which were used for other purposes than to relieve from illegal restraint, all of which were termed habeas corpus, because that was their mandate. Thus, there was *habeas corpus ad respondendum* (that you have the body to answer), *habeas corpus ad satisfaciendum* (that you have the body to make satisfaction), *habeas corpus ad testificandum* (that you have the body to testify), and also some others, the purposes of which are clearly indicated by their names. These, however, have now all completely fallen into disuse with the single exception of *habeas corpus ad testificandum,* which is still sometimes used in this country to compel a prison

[4] The People v. Bradley, 60 Ill. 390.

warden to produce in court the body of a prisoner in order that he may testify. The object of this article is to treat only that form of habeas corpus known as *ad subjiciendum et recipiendum,* the sole use of which was (and is) to determine the legality of a restraint of personal liberty.

4. **History.**—The origin of the writ of habeas corpus is unknown. Traces of it are found in the reign of Edward III. In its early days it was used only as a means of freeing from private restraint. But from the date of Magna Charta, A. D. 1215, it became the recognized mode of relief from any illegal restraint. However, in the reign of Charles I, subservient judges denied the writ to those who were imprisoned by order of the king or of the Privy Council, and this led to the passage by Parliament of two famous statutes regulating the practice and declaring the right to the writ.[5] The latter statute is called the Habeas Corpus Act. This statute has been substantially re-enacted in the various states of this country. The American colonies claimed that this writ was part of their birthright and one of the grievances recited in the Declaration of Independence was that Canada was denied the benefit of it.[6]

[5] 16 Car. I, chap. 10; 31 Car. II, chap. 2.

[6] Pollock and Maitland, History of the English Law, pp. 584, 591; Bouvier's Law Dictionary, title Habeas Corpus.

CHAPTER II.

THE RIGHT OF PERSONAL LIBERTY AND ITS LIMITATIONS.

5. **Limitations on the right of personal liberty.**—It is self-evident that under a variety of circumstances a human being may lawfully be forced to surrender his personal liberty and that the writ of habeas corpus is unavailing in such cases. As the right to the writ only arises in the case of illegal restraint we must inquire under what circumstances imprisonment is illegal. The motives, the objects, and the means of effecting illegal imprisonment are, however, infinite in number, while the law has undertaken to define and limit legal imprisonment with extreme exactness. The logical course, then, will be to determine under what circumstances imprisonment is legal. It will necessarily follow that any other imprisonment will be illegal.

6. **Same subject.**—These legal limitations are in their nature either public or private.[7]

Public limitations on the right to personal liberty are:

1. Punitive of crime.
2. Coercive of duties to the state.
3. Executive of duties to the citizen.

Private limitations on the right are:

1. Coercive of private obligation.

[7] This classification is taken from Hurd, Habeas Corpus, p. 5.

2. Incident to certain civil relations, which are:
   - *a.* Husband and wife.
   - *b.* Parent and child.
   - *c.* Guardian and ward.
   - *d.* Master and apprentice.
   - *e.* Master and servant.
   - *f.* Master and scholar.
   - *g.* Principal and special bail.

In no case can an imprisonment be legal unless it can be shown to fall within the above classification, and even so, so jealous is the law of the right to personal liberty, if the one responsible for the imprisonment exceed the well-defined limits of the authority given him by the law, he will render the restraint illegal and the writ of habeas corpus will be the effectual means of relieving the victim.

7. **Limitations punitive of crime.**—The existence and continuance of the social order necessitate the right of the state (and this generic name includes the United States or any organized government) to try persons charged with the commission of crime and to punish by imprisonment, if found guilty. The right to try includes the right to compel the presence of the accused at and during the trial, which in turn may include the right to hold the accused in confinement until the time of trial. But the right of the state in this regard has been carefully limited in this country by constitutional provisions which are collectively known as the Bill of Rights, and which were adopted in order to prevent an oppressive use of power on the part of the state.[8] The constitutional

[8] 2 Kent's Commentaries, lecture XXIV.

guaranties of personal liberty will be particularly considered further on. Any restraint, under color of public authority, which is in violation of any of these guaranties, is illegal, and habeas corpus will give relief. Not only so, but the process under which a man accused of crime is arrested must be issued by one to whom the authority has been given by law, and the court to which he is held for trial must have jurisdiction given to it by law to try for the particular crime charged, and having undertaken to exercise its jurisdiction must not exceed it. Any usurpation of jurisdiction at once renders the detention of the prisoner illegal.[9]

8. **Limitations coercive of duties to the state.**—The citizen may be compelled to perform all the duties which he owes to the state. The coercion used may take the form of imprisonment and in many cases the mere performance of the duty in itself involves a restraint of personal liberty. Thus, the payment of taxes may be coerced by imprisonment. A man who is responsible for the conception of an illegitimate child owes a duty to the state to prevent the child from becoming a public charge. The performance of the duty may be coerced by imprisonment, the man being given the alternative of giving security for the support of the child, or of going to jail until he does. The personal services which a man, as a citizen, must give to the state, in themselves involve a surrender to some extent of personal liberty and constitute imprisonment; but in all of the foregoing cases the imprisonment is legal.

[9] Church, Habeas Corpus, § 368.

The citizen must surrender his liberty to the extent necessary for service as a public official, a witness, a juror, a soldier, a member of a sheriff's posse, or the like.[10]

9. **Limitations executive of duties to the citizen.**— As between the state and its citizens the duties are not all on one side. The state, in recognition of the duty which it owes to the members of certain unfortunate classes, has established poor-houses, orphanages, insane retreats, and hospitals. Not only does the state owe this duty to its paupers, its orphans, its insane, and those afflicted with contagious diseases, but it owes to the general public the duty of protecting it against the evils which would probably result from allowing these unfortunates to be at large.[11] Obviously the execution of this twofold duty entails a restraint of liberty. But in all such cases the legality of the detention ceases when the duty is at an end. Thus, a person who has a contagious disease may be isolated. But the moment he is cured, his right to liberty is restored and his further detention is illegal. And inasmuch as a man in confinement has, at any moment, the right to have the legality of his detention judicially passed upon, one who has been isolated as a leper, or one who has been committed to an insane retreat, may at any time, and

[10] Robinson, Elementary Law (revised), § 41. There exists a popular delusion that a man is under no legal compulsion to accept public office. A man has no more right to decline what is generally understood by the term "office" than he has to refuse to obey a lawfully-made call to serve as a juror. Neither has an officeholder the right to resign. On account of an obvious defect in the social order, the legal proposition has become, and for some time must remain, a purely abstract one.

[11] Dwight, Law of Persons and Property, pp. 103-116.

epeatedly, sue out a writ of habeas corpus and there-y secure a judicial determination as to whether the ormer state, which made the original detention law-ul, still exists.[12]

10. **Limitations coercive of private obligation.**—ittle is left in this country of the old notion that a udgment debtor who refuses or is unable to pay the udgment should be persuaded to pay by lodging him n jail until he does. Nevertheless, there are states hich still allow imprisonment for judgment debt ounded on certain causes of action; also there are tates in which, when a suit is brought based upon reach of promise of marriage, or fraud, instead of he defendant being simply served with a summons o appear and defend, he is arrested on a writ which s called a *capias ad respondendum* (that you take he body of the defendant and hold him to answer he plaintiff) and he is held in custody until he gives . bond for his appearance. The rules for deter-nining the legality of detention under color of civil rocess are the same as in criminal cases. As long s the court does not exceed the authority given to t by law, there is nothing to do but to submit; but et that authority be exceeded, and habeas corpus will be as effectual a remedy as it would be in a crimi-nal case.[13]

11. **Limitations incident to the relation of hus-band and wife.**—In old times a man had a practically unlimited right to restrain his wife. She was little better than a chattel. But in its modern develop-

12 The Thaw case in New York, the recollection of which cannot yet have faded from the mind of the reader, is a fair example of this proposition.

13 Hecker v. Jarret, 3 Binney 404 (Pa.).

ment, the law has restricted this right to such reasonable confinement as is necessary to prevent her from committing deeds of violence, or to protect his honor. The necessity must in fact exist and the extent of the restraint must be reasonable. If the husband exceed his authority in either of these respects, the restraint is illegal and the wife may be released on habeas corpus.[14]

12. **Limitations incident to the relation of parent and child.**—Obviously, the duty which a parent owes to the child would be impossible of performance without the right to restrain the child's liberty. The child may be forced to live at home or at school, though even this amount of restraint would be intolerable if practiced upon one who was his own master. This right to custody includes the right of punishment, which in all cases must be reasonable in view of the seriousness of the disobedience and the health and strength of the child. Any confinement which exceeds the bounds of reason becomes unlawful and the child may be released on habeas corpus. Parents may forfeit their right to the custody of their own children by cruelty or gross immorality. In such case, the further custody by parents becomes illegal and any friend, or even an incorporated benevolent society, may sue out a writ of habeas corpus which will bring the child into court, where the forfeiture of the parents' right will be declared and proceedings may then be had for the appointment of a guardian. The right of the parent to the custody of the child may be enforced by habeas corpus as against

[14] Church, Habeas Corpus, §§ 421, 422.

ny person who unlawfully usurps the parental right. he right of the parent ceases when the child becomes wenty-one years of age, unless the child is a lunatic; nd even then the continuance of the right to custody subject to the right of the state to take charge of ne unfortunate. The latter is a paramount right.[15]

13. **Limitations incident to the relation of guardian and ward.**—The guardian of either an infant or lunatic has a right of restraint over the ward similar to, but not as extensive as, that of the parent over is child. For the exact delimitation of this right ne reader must be referred to the title Guardian and Ward in Volume V of this series. To the extent f the right the writ of habeas corpus is as available s in the case of parent and child.

14. **Limitations incident to the relation of master and apprentice.**—A minor may be indentured to master to learn a trade. The relation must be created by deed. The master acquires a right to the ervices and custody of the minor. This relation is n most of the states carefully regulated by statute. he authority of the master is derived from the arent or guardian and is limited by the terms of the eed and by the statute. Within these combined imits, the master is entitled to the custody of the apprentice and may have habeas corpus to recover such ustody from one who detains the apprentice from im; but if the character of his own custody exceeds he terms of either the deed or the statute, the apprentice may be taken from him by the same means.[16]

[15] Hurd, Habeas Corpus, p. 40.

[16] 1 Bouvier's Law Dictionary, title Apprenticeship. The reader is also referred to the statute of his own state on this subject.

15. **Limitations incident to the relation of master and servant.**—When this relation, otherwise than as an apprenticeship, exists, the right of restraint is, in this country, restricted to children under the age of discretion who have been entrusted to a master with power delegated by the parents; and to pauper children under the age of discretion, without parents or guardians, to whom the benefits of a home have been given. The Constitution of the United States declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States or in any place subject to their jurisdiction."[17] If a man contract to serve another, he will render himself liable to a suit for damages if he break the contract. But if he choose to break the contract, to restrain his liberty in order to compel performance would be to subject him to involuntary servitude and the United States court would release him on habeas corpus.[18]

16. **Limitations incident to the relation of master and scholar.**—Whatever authority a master has to restrain the liberty of a scholar is derived from the parent or guardian. It is limited to the authority that the parent or guardian had to delegate. Although the master cannot exceed the authority delegated to him without rendering himself liable in damages, it is useless to inquire whether an abuse of

[17] Thirteenth Amendment.

[18] Seamen, as well as minors, were not within the protection of the Thirteenth Amendment until the year 1898 when Congress passed an act making it unlawful to coerce a seaman by means of imprisonment to work out his contract. The South Portland, 111 Fed. 767.

uthority would cause him to respond to a writ of abeas corpus, because the parent or guardian may voke the authority at any moment. The master an never legally detain the scholar as against the arent or guardian. If, however, the scholar were idnapped, the master could recover his custody by eans of habeas corpus.[19]

17. **Limitations incident to the relation of principal and special bail.**—When one accused of crime is dmitted to bail he is obliged to give a bond conditioned on his appearance in court on a certain day. he bond must be executed by the accused and a urety, and they are called, respectively, the "principal" and the "special bail." The peculiarity about ne relation thus established is that the special bail as, at any time before the condition of the bond ecomes due, the right to take the principal into custody and surrender him to the authorities and thereby relieve himself of liability. It follows that the rincipal has no right to a writ of habeas corpus to e released from the custody of the special bail who as arrested him for this purpose.[20] Furthermore, he bail has the right to follow the principal into nother state and arrest him there. And no judicial rocess is required to authorize such arrest.[21]

19 Commonwealth v. Downes, 24 Pick. 227 (Mass.).
20 Read v. Case, 4 Conn. 166.
21 Nicolls v. Ingersoll, 7 Johns. 145 (N. Y.).

CHAPTER III.

ISSUANCE OF THE WRIT—PROCEDURE.

18. **What constitutes a restraint.**—The unlawful restraint from which habeas corpus will relieve must be actual. Commands may constitute an actual restraint if accompanied by a present intention and apparent ability to enforce them and the party submits.[22] But a present constraint to submit to future restraint is not enough. Thus, a man who is out on bail cannot have habeas corpus, no matter how illegal his original arrest was and how illegal his detention would be if he had not given bail.[23] To obtain the writ in such a case, he must surrender himself to the authorities. Being then in actual detention, he may sue out the writ to determine the legality of the restraint.[24]

19. **Imprisonment under unconstitutional statute.**—There can be no crime except in violation of law. There can be no law in contravention of either the state or the Federal Constitution. No court has jurisdiction to punish a man who has not violated the law. Therefore a man who is in custody, charged with the violation of an unconstitutional statute, is entitled on habeas corpus to an unconditional discharge, and this whether before or after convic

[22] Commonwealth v. Ridgeway, 2 Ashmead 247 (Pa.).
[23] In re Dykes, 13 Okla. 339, 74 Pac. 506.
[24] In re Gow, 139 Cal. 242, 73 Pac. 145.

on.[25] Such a state statute is a violation of the provision of the Fourteenth Amendment that "no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[26] Of course, the constitutionality of the statute is a question for the court or judge before whom the writ of habeas corpus is returnable to decide.

20. **Imprisonment under void city ordinance.**—The power of a city to regulate affairs within its borders by ordinance and to punish violations by fine and imprisonment is strictly limited by its charter. An ordinance in excess of the charter power is void. Upon the same reasoning set out in the previous section, one who is arrested for the violation of a void city ordinance is deprived of his liberty without due process of law, and may obtain release by habeas corpus.[27]

21. **Imprisonment in violation of constitutional guaranties.**—Every accused person has a constitutional right to a speedy trial. If a man be held in jail for an unreasonable time awaiting trial, his imprisonment becomes illegal, and he may resort to habeas corpus. So, in general, if a man be held to await the action of the grand jury and, upon meeting, that body fully considers his case and fails to find a true bill, he is entitled to a release. In such a case, however, a release on habeas corpus would not preclude an indictment by a subsequent grand jury, for the re-

[25] Ex parte Siebold, 100 U. S. 371.
[26] Yick Wo v. Hopkins, 118 U. S. 356.
[27] Stockton Laundry Case, 26 Fed. 611.

lease will not wipe out the offense.[28] Another constitutional right is that of an accused to be admitted to bail where the offense charged is bailable. If a man be denied bail in violation of this right, his detention is illegal, and he may have habeas corpus to enforce the right.[29] The judge before whom the writ is returnable will admit him to bail. The same remedy may be resorted to where excessive bail is required.[30] Another such right is that guaranteed by state constitutions that every accused shall be admitted to bail except in capital cases where the proof is evident or the presumption great. But in every case of the violation of the foregoing rights, resort must be had to habeas corpus while the right is being violated. As soon as the accused is brought to trial the right ceases to be violated and the illegality of the detention ceases.[31] The Fifth Amendment to the Federal Constitution says that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury." So, where a man was indicted, and the indictment was altered without being re-submitted to the grand jury, and he was tried and convicted, he was released on habeas corpus because the document containing the charge on which he was tried did not come within the definition of an indictment.[32]

22. **Lack or excess of jurisdiction and mere error.** —There is no escape from the proposition that if

[28] Walker v. Martin, 43 Ill. 508.
[29] People v. Town, 3 Scam. 19 (Ill.).
[30] Jones v. Kelly, 17 Mass. 116.
[31] In re Riley, 2 Pick. 172 (Mass.).
[32] Ex parte Bridges, 2 Woods 428 (U. S.); Ex parte Bain, 121 U. S. 1.

man is detained as a result of a court having acted without jurisdiction, or of a court having exceeded its jurisdiction, his detention is illegal. Thus, a justice of the peace might issue a warrant for the arrest of a man on the charge of murder. Assuming a proper complaint to have been made, the arrest would be legal. But suppose the justice, having the prisoner before him, were to pretend to try him for the crime, and, finding him guilty, were to sentence him,—the detention, from the very moment of the unlawful assertion of jurisdiction, would entitle the victim to release upon habeas corpus.[33] On the other hand, a detention resulting from what we call "mere error" is not illegal. The distinction is a very difficult one to explain. Excess of jurisdiction is a fundamental defect which is fatal—which renders all proceedings void from that point on. Mere error has no effect on jurisdiction and does not render illegal a detention which was before legal. A mere irregularity or error is the want of adherence to some prescribed rule or mode of proceeding, and it consists in omitting to do something that is necessary to the orderly conduct of a suit, or the doing of it at an unreasonable time, or in an improper manner.[34] The only effect of it is to render the proceedings voidable—that is to say, liable to be set aside on an appellate proceeding known as writ of error. But unless and until a judgment or sentence is so set aside, if it is based upon mere error, it is perfectly valid and binding and must be so treated by the courts, and therefore an

[33] Miller v. Snyder, 6 Ind. 1.
[34] 1 Tidd's Practice, p. 434.

imprisonment under it could not be relieved against by habeas corpus. On the other hand, a fatal defect is one that is repugnant to the principles of law as distinguished from the mere rules of procedure.[35] A judgment based upon such a defect is void—it is not a judgment at all—no one is bound to recognize it or submit to it, and imprisonment under it is illegal, and habeas corpus will relieve from it. If a man be on trial for a felony before a court of competent jurisdiction, any errors of the judge in admitting or rejecting evidence,[36] or in charging the jury,[37] would not affect the validity of the verdict or of the sentence so long as it remained unreversed. But if the judge were to assume to try the case without a jury, a constituent part of the court would be lacking—there would be no court; the judge would be acting without jurisdiction, and his sentence would be void.[38]

23. **Particular examples of legal and illegal detention.**—In general, it may be said that the mere fact that a man has been sentenced to imprisonment in the wrong place will not entitle him to release on habeas corpus. But if the court which sentenced him sat in a place not provided by law, the sentence would be void.[39] Where the sentence is in excess of that allowed by law, it is valid to the extent of the power, but void as to the excess. In such a case, the prisoner must serve the maximum time allowed by law and then he may have habeas corpus.[40] A sen-

[35] Ex parte Gibson, 31 Cal. 619.
[36] Turney v. Barr, 75 Iowa 758.
[37] Church, Habeas Corpus, § 363.
[38] Bouvier's Law Dictionary, title Jury.
[39] Ex parte Jones, 49 Ark. 110.
[40] Ex parte Mooney, 26 W. Va. 36.

sence based on a conviction which was not warranted by the evidence, or was contrary to the charge of the court, is mere error.[41] But a judgment not based on a conviction is void.[42] Error in overruling a special plea and obliging a prisoner to go to trial on the merits is mere error.[43] The same is true of a denial of compulsory process for the prisoner's witnesses.[44] A man has a constitutional right not to be tried twice for the same offense; but the fact of former jeopardy must be set up in defense on the second trial and can not be made the basis of habeas corpus.[45] On the other hand, as an executive pardon wipes out all liability to punishment, if a convicted man be pardoned and then reindicted, habeas corpus will release him.[46] If an examining magistrate commit a man for trial or to await the action of the grand jury when there is no probable cause, the detention is illegal.[47]

24. **Who may apply for the writ.**—Bearing in mind that the writ will relieve from any illegal imprisonment whether without or under color of process, civil or criminal, it goes without saying that the one who is entitled to the relief is the logical one to apply for it. And yet, the very nature of the wrong will sometimes make it impossible for the victim of an illegal detention to apply himself, and the application need not come directly from him or be ex-

41 In re Thompson, 9 Mont. 381.
42 Ex parte Garvey, 7 Colo. 384.
43 Ex parte Snyder, 29 Mo. App. 256.
44 Ex parte Harding, 120 U. S. 782.
45 Ex parte Maxwell, 11 Nev. 428.
46 State v. Stalmaker, 2 Brev. 1 (S. C.).
47 In re Balcolm, 12 Neb. 316, 11 N. W. 312.

pressly authorized by him. It may be made by a friend on behalf of the prisoner.[48] A wife may apply on behalf of her husband;[49] a husband on behalf of his wife;[50] and it is not necessary that the applicant sustain any legal relation to the prisoner. Anyone may apply who can show good reason why the prisoner cannot apply for himself.[51] Furthermore, the writ can be made to serve the double use of freeing from illegal restraint and of recovering a legal custody by one entitled thereto. By this means a parent can secure the custody of his minor child;[52] a guardian, the custody of his ward;[53] a master, the custody of his apprentice;[54] a special bail, the custody of his principal.[55]

25. **Application for the writ.**—The judges having authority to grant the writ are always designated by the Constitution or by statute. In Illinois, the writ may be issued by the supreme court, by the circuit courts in term time, and by the judges thereof in vacation, and by masters in chancery in their respective counties when the judge is absent from the county.[56] The judges of the United States District Courts can grant the writ only in cases where the detention is in violation of the laws of the United States.[57] Appli-

[48] 14 Howard's Eng. State Trials, 814.

[49] In re Ferrens, 3 Benedict 442 (U. S.).

[50] Anne Gregory's Case, 4 Burrows (K. B.) 1991 (Eng.).

[51] The Hottentot Venus Case, 13 East. 195 (Eng.). In this English case, the application was made by a benevolent society on the allegation that the prisoner was too ignorant to know that she had a right to her liberty.

[52] People v. Mercein, 3 Hill 399 (N. Y.).

[53] Commonwealth v. Downes, 24 Pick. 227 (Mass.).

[54] People v. Pillow, 1 Sandf. 672 (N. Y.).

[55] Anonymous, 1 Penn. 284 (N. J.).

[56] Hurd's Revised Statutes (1911), p. 668, § 8; p. 678, § 63; p. 1517, § 6.

[57] U. S. Rev. Stats., § 733.

ation must be made by petition, which must not simly aver an illegal detention, but must set forth the acts out of which the detention grew. These facts must show that as matter of law the detention is illegal, and for the purpose of obtaining the writ, the verments of the petition are taken as true. The petition must make out a prima facie case of illegal confinement. Thus, if the writ is asked on the ground that the prisoner has been held without probable cause to await the action of the grand jury, the petition must set forth the evidence taken by the committing magistrate.[58] If the facts set forth in the petition show the confinement to be legal, the writ will be refused.[59] But if the facts make out a prima facie case, the judge has no discretion—he must grant the writ.[60] The petition must be verified.[61]

26. **The writ.**—Whether the judge, upon granting the writ, signs it himself or orders it to issue from the clerk's office, depends upon local practice. No Federal judge has any authority to sign process of any kind. The writ is a precept directed to the one alleged to be guilty of the illegal restraint (who is called the respondent), requiring him to produce the body of his prisoner in court or before the judge at a time named, or forthwith to submit to and receive what the court shall order, and to have with him the cause of the detention (his return).[62] The writ hav-

[58] In re Klepper, 26 Ill. 532.

[59] Ex parte Watkins, 3 Pet. 193 (U. S.).

[60] Ex parte Wilson, 40 Fed. 66.

[61] For forms of petition upon various grounds, and the verification, see Puterbaugh's Pleading and Practice at Law (6th ed.), p. 719.

[62] A general form of a writ of habeas corpus will be found in Puterbaugh's Pleading and Practice at Law (6th ed.), p. 724.

ing been served on the respondent, he should yield prompt obedience to the precept so far as it is possible for him to do so. If it is impossible for him to produce the prisoner, either because he is not detaining him, or because the prisoner is too ill to be moved, or for any other cause, he is still bound to make return.

27. **The respondent's return.**—Whether the respondent have the custody of the prisoner or not, and if he have, whether legally or illegally, he must answer the writ at the time named (although the judge, in his discretion, may extend the time). This answer is technically called "the respondent's return." The answer must be in writing, verified. If the respondent claim that he has no control over the petitioner, he must so answer. But if the petitioner is in his control, he must produce him and the return must set out the cause of the detention. The respondent may admit the facts set out in the petition and submit to the court the question whether or not these facts constitute a legal ground of restraint. Or, he may take the ground that the petitioner has not told the true facts, or all of them, and give his own version of the cause of the detention. If the respondent has the petitioner in custody, but cannot produce him by reason of illness, or, as said above, for any cause whatever, he must give the excuse along with the cause of the detention.[63]

28. **The hearing.**—There can be no hearing on the merits of the writ unless the prisoner is physically

[63] For various forms of return, see Puterbaugh's Pleading and Practice at Law (6th ed.), p. 726.

efore the court.[64] Therefore if, between the suing ut of the writ and the return, the prisoner has escaped and is still at large, the writ will be dismissed. If the prisoner is before the court and the return dmits the facts stated in the petition, the court ecides the point of law. If the facts in the return ary from the petition, the petitioner may admit hem, and again there is only a question of law to be etermined. Or, the petitioner may controvert the ruth of the return (traverse it), and this will raise n issue of fact to be determined by evidence without jury. If the issue, whether of law or of fact, be letermined in favor of the prisoner, he is given his iberty; if against him, he is remanded to the custody f the respondent.

29. **Obedience to the writ.**—This is enforced by contempt proceedings. But in this the court will be guided by the circumstances of each case. First, the court must have evidence that the writ has been served on the respondent. If the writ has been served and the respondent makes return refusing to produce the prisoner, and gives no valid excuse, this is a contempt which will cause an immediate arrest of the respondent and his commitment to jail until he purges himself of the contempt. But under ordinary circumstances, the mere failure of the respondent to make a return at the time named in the writ will not subject him to arrest. The court will generally give him another chance by issuing against him a rule to show cause why he should not be attached for contempt for failure to make a return. If, after serv-

[64] Board of Supervisors v. Leigh, 69 Miss. 754, 13 So. 854.

ice and return of the rule, the respondent fails to make return, he is then punished.[65]

30. **Suspension of the writ.**—The Constitution of the United States declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."[66] The same provision has been incorporated in the constitutions of most of the states, although a few of the state constitutions forbid the suspension of the writ under any circumstances. By authority of Congress, President Lincoln suspended the writ in 1863, and the suspension was effective during the remainder of the rebellion. The writ has several times been suspended in the individual states, notably in Massachusetts at the time of the Shay rebellion, in Rhode Island at the time of the Dorr rebellion, in Shoshone County, Idaho, at the time of the insurrection in 1899, and lately in the coal region of West Virginia, in which martial law was declared.[67] The better opinion seems to be that the power to suspend the writ lies in the legislature and not in the executive.[68]

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The latest and most complete work on our subject is *Bailey* on Habeas Corpus; but as the law of habeas corpus is simply the law of personal liberty, which involves all the branches of law that are classified in § 6, p. 633, it will be better in a given case not to confine one's investigations to a monograph on habeas

[65] Church, Habeas Corpus, § 137.

[66] Art. I, § 9.

[67] State ex rel. Mays v. Brown, 77 S. E. 243 (W. Va.).

[68] Ex parte Merryman, Taney 246 (U. S.), 17 Fed. Cas. 144; 3 Story, Constitution, § 1336.

rpus but to consult an authority on that branch of the law ithin which the supposed illegality would fall. Thus, if the lidity of judicial process is concerned, consult *Freeman* on dgments, *Bishop's* Criminal Law, *Bishop's* New Criminal rocedure and *Tidd's* Practice. If a question of constitutional ght or privilege is involved, consult *Story* on the Constitution - *Cooley's* Constitutional Limitations. In a case involving the lidity of a city ordinance, there is nothing better than *Dillon* n Municipal Corporations. Where the question concerns the omestic relations, there are *Schouler* on Domestic Relations and *eck* on Domestic Relations. For the procedure, consult any of e works on habeas corpus, among which none are better than *ailey, Hurd,* and *Church,* or *Puterbaugh's* Pleading and Prac- ce at Common Law, after first familiarizing yourself with the atutory provisions in your state on the subject.

QUIZ QUESTIONS

HABEAS CORPUS

(The numbers refer to the numbered sections in the text.)

1. (a) Define the writ of habeas corpus. (b) What portion of the law of habeas corpus is covered by the definition?
2. (a) Why is the writ of habeas corpus called a "prerogative writ"? Why is it called an "extraordinary writ"? Why is it called a "writ of right"? (b) What are the terms of the guaranty of personal liberty contained in Magna Charta?
3. (a) What is the purpose of the writ which is known by the general name of habeas corpus and which is technically styled "habeas corpus ad subjiciendum et recipiendum"? (b) What is the object of the writ known as "habeas corpus ad testificandum"?
4. (a) What is the origin of the writ which is the subject of this article? In early days to what uses was it restricted? (b) In connection with our subject, what was one of the grievances recited by the Declaration of Independence?
5. What is the logical method of ascertaining what imprisonment is illegal?
6. Make a statement in classified form of the limitations on the right of personal liberty.
7. The state constitution restricted the criminal jurisdiction of the city court to the trial of misdemeanors. Alfred Barnes was brought to trial before this court on a charge of arson. The jury found him guilty and he was sentenced to ten years in the state prison where he now is. He wants to know if he can secure a writ of habeas corpus on these facts.
8. The sheriff, having a warrant for the arrest of a notorious desperado who is hiding in the mountains, orders A to join him and assist in the capture, and threatens A with arrest

if he refuses. A submits, but as there is a prospect that he may be obliged to serve several days, he applies for a writ of habeas corpus. Is he entitled to it on these facts?

9. A was ill at his home and his physician reported the case to the Board of Health as smallpox. The Board sent their own physician to see the patient and he confirmed the report. Thereupon, by order of the Board, A was forcibly taken from his home and was confined in the county hospital for contagious diseases. The question is, will the writ of habeas corpus avail to release him?

10. In a general way, what is the state of the law in this country with regard to imprisonment for debt?

11. A and B were husband and wife. B announced her fixed intention of going on the stage. Remonstrances proving of no avail, A locked his wife up and refused to release her until she abandoned her intention. B's brother discovered her predicament and applied for a writ of habeas corpus directed to A. Was the issuance of the writ justified on these facts? The facts being admitted by A on the return of the writ, was B entitled to be released?

12. A boy twelve years of age, for a slight act of disobedience, was chained to the bed by his drunken father and was kept there for two weeks on bread and water. The agent of the S. P. C. C. heard of the case and he applied for and obtained a writ of habeas corpus. The father made return, claiming the right to confine the boy by virtue of parental authority. When produced in court, the boy was emaciated and covered with sores. What action should the court have taken?

13. Suppose that a child whose parents were dead and who had a guardian were kidnapped by his aunt who was anxious to adopt him and bring him up. Could the guardian regain the custody of the child by means of habeas corpus?

14-15. (a) A boy of eighteen years of age is "indentured out" as an apprentice for ten years and upon reaching his majority he concludes not to work for the master any longer; but the master refuses to release him and forcibly restrains him. Will habeas corpus avail to release the boy contrary to the terms of the deed? (b) A, being of age, contracts to work for B for a year. He works a week and

then throws up his job and goes to work for C. Can B secure the custody of A by means of a writ of habeas corpus directed to C in order to compel A to work out his contract?

5. A has secured a divorce from his wife, B. The court awarded the custody of their only child to the father who placed him in a boarding school. B kidnapped the child. Could the head master of the school regain custody of the child by means of habeas corpus?

7. A is charged with crime in Chicago and is admitted to bail, B going on the bail bond. A then went to New York and immediately B, fearing that A was going to jump his bail, hired a couple of men and went to New York and arrested A and started with him for Chicago, intending to surrender him to the authorities. Upon these facts would a New York court release A on habeas corpus?

8. What constitutes a restraint?

9. Adultery is not a crime at common law. The legislature makes it a crime and declares that the statute shall apply to acts of adultery committed prior to the statute. A is arrested charged with adultery committed prior to the statute. Can he have habeas corpus?

10. A city ordinance established a public market and made it an offense punishable by imprisonment to sell meat within the city limits outside of the public market. The charter gave no power to regulate markets. Could a man who was arrested for violation of the ordinance obtain release by means of habeas corpus?

11. Is habeas corpus a proper remedy where a man has been sentenced to imprisonment without due process of law? Give an example of such a sentence.

12. A man was on trial for burglary and his defense was an alibi. Against the prisoner's objection the court permitted the state to introduce evidence tending to show that the prisoner had been guilty of other burglaries. Conviction and sentence to ten years' imprisonment followed. What is the prisoner's remedy? Explain fully.

13. In a state in which the common law right of trial by jury was "forever preserved inviolate," in a murder trial, the judge, finding that the jury could not agree, accepted a

majority verdict of guilty and sentenced the prisoner to imprisonment for life. Would habeas corpus avail him?

24. Who may apply for the writ of habeas corpus?
25. What is the petition for the writ of habeas corpus required to make out?
26. What does the writ of habeas corpus command?
27. What is the technical term applied to the one to whom the writ of habeas corpus is directed? What is his answer called? What happens if he takes no notice of the writ after it has been served on him?
28. A warden was served with a writ of habeas corpus requiring him to produce a certain prisoner in court the following morning. That night the prisoner escaped and at the hour of return was still at large. What should the court do?
29. How is obedience to the writ of habeas corpus enforced?
30. Under what circumstances may the privilege of the writ of habeas corpus be suspended?

PART VI

INTERPRETATION OF STATUTES

BY

JOHN R. ROOD, LL. B.*

1. **Power and duty.**—The state is divided into ıree grand departments,—legislative, judicial, and ɜecutive. The legislative enacts what the law shall ɜ; the judicial interprets the meaning, validity, and ffect of the enactment; and the executive adminis- rs the law as interpreted. There is no other branch the government enabled to interpret. It would not ɔ to leave to the legislative both the enactment and ıterpretation. To submit to it the application of ɜery law to each particular case would turn the ıgislature into a court. The effect of submitting the ıestion to the chief executive for decision is illus- ɜated by the experience of the Romans, who took ıch matters to the emperor for decision. The wisest ıd most logical method is to leave the matter to the ɔurts, to be determined for each case as it arises, and ıch is the spirit of our Constitution.

The court must decide whether the statute is public r private, general or local, valid or void; whether ɜo statutes can stand together; if so, what are their ıeaning and effect, and whether and how they apply

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to the case in hand. These are questions of law. The judge cannot escape his duty by submitting the questions to the jury for decision; the court must decide. When the Constitution of the United States declared that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, and all other officers of the United States whose appointments are not otherwise provided for;" and, pursuant thereto, the President, with the advice and consent of the Senate, appointed William Marbury Justice of the Peace for the county of Washington, in the District of Columbia, for five years, and later, on direction of the President, James Madison, Secretary of State of the United States, refused to deliver the commission of appointment, and Marbury asked the Supreme Court of the United States to compel delivery by a writ of mandamus, that court was compelled to perform a delicate duty. It was compelled to interpret the Constitution and the statutes, and declare the right of the appointee, though in direct conflict with the President.[1] But foreign laws are matter of fact to be proved to and found by the jury.

2. **Duration and territorial operation.**—Statutes once enacted continue to operate until repealed unless limited to a specified time by their own terms. They are not displaced by revolution in the government, as in case of the American Revolution, nor by cession of territory, as in case of the Louisiana Purchase.

When the legislature of a country enacts a statute it binds the citizens of that country there; and when

[1] Marbury v. Madison, 1 Cranch 137 (U. S.).

ose citizens settle in a foreign land, not before der the domain of any law, the jurisdiction of the vereign over them continues, and they remain bound the law of the mother country when they settle in e new colony; or, otherwise stated, they retain the essings of their home law, with which they are miliar, and which is in all probability best suited their condition and habits. Thus the American lonies were bound by the English common law and atutes existing at the time of the settlement. But e statutes enacted by the Parliament of England ter the settlement did not extend to the colony less given colonial operation by express enactment. atutes of England would be common law in Pennlvania, which, by reason of its earlier settlement, ould not operate in Virginia. As to most of the ates, the matter is controlled by express enactment. or example, the legislature of the Territory of Michan, in 1820, enacted that all the statutes of England, rance, the Province of Quebec, the Territory of ndiana, and the Northwest Territory were thereby pealed; thus avoiding the endless uncertainty and consistency of the conflicting laws of the various vereignties under which the land had from time time been held. On the other hand, it has recently een held in Kansas that the English Statute de onis, enacted in 1285 A. D., is in force in Kansas, hough the land of that state never was a part of any nglish colony. This result is gathered from an terpretation of the Kansas statutes.[2]

3. **General rules.**—The Constitution of the United

[2] Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131.

States is the paramount law of the land. Subject to it stand the acts of Congress and treaties made within the Constitution; next in order are the constitutions of the states, then the state statutes, and finally, the ordinances of local municipalities: each within their own territorial limits. If an old and a new statute or constitutional provision conflict, the later displaces the former. The general object of all interpretation is to arrive at the true intent of the law-making body. In search for the legislative intent, the court will consider every part of the statute, the former law, the mischief, the remedy, and whether a proposed interpretation would give effect to the probable intention, render any part of the statute inoperative, produce an unreasonable effect, injustice, conflict with contemporary legislation, change a well-known and established policy of the state, violate a provision of the Constitution, create an absurdity; and the court will not believe the legislature intended any of these strange things in the absence of the clearest expression of intention, nor if there is any other available construction that can be put on the law.

Other things being equal, the legislature will be presumed to have used words in their plain, ordinary meaning, and technical terms in their technical sense, and the spirit will be taken to be expressed in the letter of the law; but when such interpretation would result in any of the absurdities above indicated, the court will endeavor to give the statute a reasonable interpretation though not in accord with its strict letter. The legislative intent being plain, there is

room for considerations of wisdom or policy, and is the duty of the court to give the legislative meang effect so far as it is in accord with the Constitun. If part of the statute is unconstitutional, the st is not destroyed thereby, unless to let it stand one would produce an unreasonable result that can-t have been intended by the legislature. When the come tax cases first came before the court it was ld that part of the statute provisions were uncontitutional, but on rehearing it was concluded that ithout these the legislative intent would not be ffectuated, and so the whole was held void.[3]

4. **Presumptions in aid of construction.**—It is to e presumed that the legislature knew the scope of s powers, and did not intend the act to apply to cts done or contracts made outside of the state, in o way affecting persons or property in the state; or intend the act to violate the constitutional restricons. It is presumed that the legislature knew the rior state of the law, and seeks by the act to make me change therein. If the law is adopted from me other state in which it has already been interreted by the courts, the legislature is presumed to ave known of such interpretation and to have ntended to adopt it. The established interpretation a part of the law adopted, and the decisions of the urts of the state from which the act was adopted, ade before the adoption, are binding on the courts f the state adopting the law. It is a principle, lways held sacred in the United States, that laws y which human conduct is to be regulated look

[3] Pollock v. Farmer's Loan and Trust Co., 158 U. S. 601, 15 S. C. R. 912.

forward, not backward; and statutes will never be given a retrospective operation unless the intention of the legislature is so clearly expressed as to exclude any other interpretation.

5. **Intrinsic aids to construction.**—The statute must be construed as a whole, and given such an interpretation as will give every provision and word in it effect, and such construction as will avoid bringing one provision in conflict with another. Even an unconstitutional provision may be considered in arriving at the meaning of a provision which is constitutional. If a general and a special provision conflict, it will be presumed that the special was intended as an exception to the general, and thus both are given effect. It is a technical rule of last extremity that if two provisions conflict the last shall prevail, as the last expression of the legislative will. If the former provision effectuates an obvious policy of the law, it will prevail over a later apparently inconsistent clause. Where the context renders the meaning of a term in one part of a law clear, such will be presumed to have been its meaning in another place where the sense would otherwise be doubtful. The context may make the meaning clear where an inappropriate word is used. The court may even interpret a word out of the statute, if such is the manifest meaning.

On conviction of soliciting sales of intoxicating liquors in quantities less than five gallons, in violation of statute, it was contended that the statute was void for uncertainty, being entitled: "An act prohibiting the sale of intoxicating liquors, and for the

ranting of license for the sale of spirituous and
inous liquors, and providing a penalty for violation
nereof"; and enacting in the first section that who-
ver, not having a license, shall solicit any person, not
aving a license to keep a saloon, or a physician or
ruggist, to buy or contract for delivery of liquors in
ss quantities than five gallons, shall be subject to
fine; and enacting in section two that the county
ommissioners may license persons to sell not less
nan five gallons to persons not licensed to keep a
aloon; the court held the statute valid, and that the
econd "not" in the second section should be omitted
n reading. The court declared the meaning should
e effectuated despite awkward, slovenly, ungram-
natical English, and discussed many of the other
ules declared in this section.[4]

6. **Same—Preamble, title, and recitals.**—The
itle of a statute constitutes no part of it, and cannot
e resorted to in aid of construction where the mean-
ng and scope of the enacting provisions are plain and
nambiguous; it neither extends nor restricts the
cope of the act; but should not be ignored in cases
f doubt, and may furnish the key to the true mean-
ng. The effect of the title is somewhat greater if
he Constitution requires the act to be entitled and
he purpose to be stated in the title. On mandamus
o compel the auditor to register an issue of refund-
ng bonds, he defended that the act, as shown by its
itle, related only to "warrant indebtedness"; but
he mandamus was granted, the court saying: "There
is nothing in our organic act or statute which requires

[4] State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

that the title of the act should be expressive of its contents. In the absence of any such provision, either in the organic law or other statutory provision, it is not essential, for the purpose of upholding the validity of the law; and hence the title is only to be referred to in case of ambiguity arising out of the body of the law. * * * Originally in the English courts the title was held to be no part of the act; 'no more,' says Lord Holt, 'than a title of a book is part of the book.' Mills v. Wilkins, 6 Mod. 62. It was generally framed by the clerk of the House of Parliament where the act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered only as a formal part. It cannot be used to extend or restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature. In this case there is no doubt that the legislature intended to provide for and regulate the issuance of refunding bonds in certain cases; hence there is no occasion to refer to the title of the act for aid in its explanation."[5] Similar rules apply to the preamble and recitals. The preamble shows the motive of the legislature, but the enactment is often broader or narrower than the recitals, and is not controlled by them.

7. **Extrinsic aids to construction.**—The court will take judicial notice of common law and statutes, and

[5] Territory v. Hopkins, 9 Okla. 133, 59 Pac. 976.

atters of public general history and knowledge. nd in ascertaining the intention of the legislature e court will consider other laws existing on the bject at the time this one was enacted, the provocaon that led up to the enactment, the history of the mes and the history of the particular act. The jourals of the houses may be resorted to; but no reliance interpretation can be laid on debates on the bill in urse of passage. It is well known that members do ot all act from the same motives nor on the same nderstanding. If custom and usage since the statute as passed have put a practical construction upon it, is has great weight with the courts in construing e law. Where a tax law required persons, seeking deduct debts owed from credits taxed, to file a list such debts, and railways were taxed according to eir gross earnings, it was held that the fact that efendant had been in business in the state for thirtyve years, and neither it nor any other railway comany had ever filed or been asked to file a list of debts, owed that the statute did not apply, and had never een understood to apply, to railway companies.[6]

8. **Strict construction.**—It is often said that enal statutes are strictly construed, as are also atutes in derogation of the common law; but that emedial statutes are liberally construed. It may ften be matter of debate whether a particular statute remedial or penal, and it is not meant by the statement that in any case the words will be given the narowest or the broadest possible construction. In any ase the language is to be given a fair interpretation.

[6] State v. Northern Pac. Ry. Co., 95 Minn. 43, 103 N. W. 731.

Among statutes regarded as penal may be mentioned all acts imposing a fine, corporal punishment, imprisonment, or forfeiture, though enacted to promote peace and good order in society; and in all these cases the accused is to be given the benefit of the doubt as to the meaning of the language, and never held if his act does not violate its letter; and yet even here a fair interpretation is to be given. When it was made a crime for a man to marry his brother's wife, marrying a brother's widow was held to be criminal within the intent of the statute.[7] Statutes giving right of recovery to informers other than the party injured, or more than compensatory damages to an injured party are also penal and to be strictly construed. Even statutes highly remedial are to be strictly construed when they create a right of recovery against one not liable before. Statutes granting special privileges (such as the power to private corporations to exercise eminent domain); restricting natural liberty (by restraining persons from practicing a business without license); against natural right (requiring services without compensation from doctors in specified cases); in derogation of common law rights (such as Statutes of Limitations); are also instances of statutes to be strictly construed.

9. **Liberal construction.**—Remedial statutes are to be liberally construed; and in the modern sense these include such as are designed to cure defects in the prior law, whether common or statutory, substantive or procedural, and have been said to include all statutes enacted for the common good and not

7 Commonwealth v. Perryman, 2 Leigh 717 (Va.).

early within some class to be strictly construed. As amples of remedial legislation may be mentioned atutes to prevent perpetration of frauds, to reform ocedure in the courts, to protect the public from ntagious diseases, unsanitary conditions, exposure injury by accident, or giving new remedies for old rongs. Remedial statutes are to be construed so to suppress the mischief and advance the remedy. hough now a matter of history and no longer in use, was once the practice to construe such laws accordg to the equity of the statute as it was called.[8] This ctrine serves today only as an occasional reference justify action by courts in extending statutes yond their terms in extreme cases, which is rarely sorted to. The danger of giving effect to what is lled the equity of the statute is often mentioned, d practically all that remains of the doctrine is thus pressed by Lord Camden: "Where it is clear the erson or thing expressed is put by way of example, e judges must fill up the catalogue; yet we ought be sure from the words and meaning of the act self, that the thing or person is really inserted as n example."[9] The principle of liberal construcon operates to extend the statute to cases within the ntention, but not within the letter, for example,

[8] For example, Littleton says (§21): "Though they be not by express ords specified in the said statute, they are taken by the equity of the me"; of which Lord Coke says: "Equity is a construction made by the dges, that cases out of the letter of the statute, yet being within the same ischief, or cause of the making of the same, shall be within the same medy that the statute provideth; and the reason hereof is, for that the w-makers could not possibly set down all cases in express terms." Coke Littleton, 24b.

[9] Entick v. Carrington, 19 St. Tr. 1067 (Eng.).

entitling defendant in whose favor judgment was rendered to garnishment under a statute providing that the plaintiff may have garnishment to recover balance due on any judgment.[10] But the principle also operates to restrict the statute to cases within the legislative intention, excluding those within the words but not within the meaning. Thus, the Statute of Frauds, designed to prevent fraud, has been so interpreted as to prevent designing persons perpetrating frauds by shielding themselves behind the words of the law, and part performance has been held to take the case out of the Statute.

10. **Repeals.**—All statutes are in their nature repealable. No legislature can bind itself or its successors not to repeal a statute, nor limit the time or manner of repeal. The power that enacts can repeal. The repealing act may be passed the same day as the act repealed. Only the legislature can repeal. Popular opposition, neglect to enforce, and long continuance of inconsistent custom, may influence the court to clemency, or even resolve a doubt as to the meaning, but they cannot repeal. Repeals are express or implied. An express repeal may operate though all the statute but the repealing clause is void; but when the repealing clause is manifestly to clear the way for the law containing the repealing clause, if the rest of the law is void, the court will deny effect to the repealing clause also, since there is no intent to repeal the former law without the substitute taking its place. For example, when a law providing a new charter for the City of Galveston was held unconstitutional

[10] Esler v. Kent, Circuit Judge, 108 Mich. 543, 66 N. W. 485.

cept the clause repealing the former charter, the urt held that ineffective also, since the legislature uld not have intended to leave the city without any ovision for government.[11]

All prior laws inconsistent with a later law are pealed by implication; but there must be a clear pugnancy, in the absence of an express repeal. The urt will otherwise harmonize the acts if possible, or old the prior law repealed only so far as necessary give place to the later. But when the new law is anifestly intended to cover the whole field it will e construed to repeal the whole of the old law by ecessary implication. Strong examples of this sort e general revisions, and statutes amending the for- er law to "read as follows." The effect of the epeal is that as to all but transactions entirely closed ne law is as if it had never been. In the absence of saving clause no action can be maintained on the epealed law, even as to past transactions. By the epeal the old law is revived as if it were newly nacted. On motion in arrest of judgment on con- iction in 1831 of digging up a dead body, February 0, 1831, in violation of the statute of 1814, repealed few days after the act by the statute of 1830, it was aid by Shaw, C. J.: "It is clear that there can be o legal conviction for an offense unless the act be ontrary to law at the time it is committed, nor can here be a judgment unless the law is in force at the ime of the indictment and judgment. If the law eases to operate by its own limitation or by a repeal t any time before judgment, no judgment can be

[11] Galveston & W. Ry. v. Galveston, 96 Tex. 520, 74 S. W. 537.

given. Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed. These principles settle the present case. By the statute of 1830, chapter 57, § 6, that of 1814 was repealed without any saving clause. The act charged upon the defendants as an offense was done after the passing of the statute of 1814, and before that of 1830. The act cannot be punished as an offense at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed without a saving clause; nor by the statute of 1830, for the act was done before that statute was passed. No judgment, therefore, can be rendered against the defendants on this indictment."[12]

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[12] Commonwealth v. Marshall, 11 Pick. 350 (Mass.), 22 Am. Dec. 377.

QUIZ QUESTIONS

INTERPRETATION OF STATUTES

(*The numbers refer to the numbered sections in the text.*)

1. The clerk of the superior court sues the city for his salary, and the defendant demurs on the ground that there is no such court, the statute which created it being unconstitutional. Can the court consider that point, or was it for the legislature to pass on in enacting the statute, or for the jury as matter of fact, the work having been performed?
2. Suit is brought in a Missouri court by an heir against the devisee of his father, contending that by the laws of France a child cannot be disinherited. Is the French law applicable, and how do you know?
3. On indictment for burglary under the statute which defined the crime to be breaking into the dwelling-house of another in the night-time with felonious intent, the defendant offered in defense to show that the place was not a dwelling-house, but an outhouse eight feet behind the house. What does "dwelling-house" mean in the statute, and why?
4. A statute provided that money obtained at gaming in excess of $10 at a single sitting may be recovered by the loser with a penalty equal to quarter of the sum taken. Defendant proved that the parties took dinner between the games; but the court instructed the jury that did not divide the sitting, since such had been held by the courts of the state from which the law was taken. Was this error?
5. Under a law rendering all wills made by unmarried

women revoked by their subsequent marriage, a married woman made a will, her husband died, she married again, and died, and her will was offered for probate. It was contended that this was not a will made by an unmarried woman. Can the word "unmarried" be interpreted out of the statute to avoid this will?

6. What is the importance of the fact that the act was entitled "An Act to Avoid Wills on Marriage"?
7. Are congressional debates available to affect the meaning of acts of Congress in cases of doubt?
8. A statute declared it a misdemeanor for any man to prescribe medical treatment for another without obtaining license from the state board of medical examiners. Is it a good defense that defendant is a woman?
9. Is the foregoing a penal or remedial statute? If remedial, can it be extended to cover this case because coming within the same mischief? If not, is there any ground on which it could be included?
10. Suit was brought to recover treble damages under the statute for malicious injury to property, and the statute was repealed while the action was pending. Is the repeal available in defense? Why?

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